Supreme Court, U.S.
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No. 04-

IN THE
Supreme Court of the United States

WALLACE R. BENNETT,

Petitioner,

v.

THE SOCIETY OF LLOYDS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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DETERMINATIVE QUESTIONS PRESENTED

(1) Can an encompassing international enterprise, LLOYDS OF LONDON, justifiably claim federal diversity of citizenship jurisdiction under 28 U.S.C. § 1332 against a constituent American investor member thereof; can necessary diversity be created through assignments from dominated agencies and partnership syndicates to "The Society of Lloyds", a unique English "corporation and society", the designated plaintiff?[1]

(2) Can execution sought in the U.S. of an *en masse* U.K. summary judgment be based on the reputed general fairness of that foreign legal *system*, without also assessing applicable substantive due process standards and safeguards of the *forum state*, in this instance Utah statutes, case law and equity, in accordance with the congressional Rules of Decision Act, 28 U.S.C. § 1652.

(3) Can the economically-dominant party in a complex investment interrelationship (EDWARD WILLIAMS COUTTS & PARTNERS, LTD./ LLOYDS OF LONDON) with investor Wallace Reed Bennett, enforceably proscribe accounting set-offs between them; and take advantage of conflict of interest powers drafted into that fiduciary relationship, shielded by a U.K. government enactment?

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1. In hundreds of cases that have come and are coming to circuit courts, particularly the Sixth and now Tenth Circuit have reached opposite conclusions from the Seventh respecting threshold jurisdictional exclusions from 28 U.S.C. § 1332.

The Lloyds Act of 1982 **exempts**:

> the Society from liability in damages at the suit of a member of the Lloyd's community . . . whether for negligence or other tort, breach of duty or otherwise, in respect of any exercise of or omission to exercise any power, duty or functions conferred by Lloyd's Acts 1871 to 1982. . . . [a 111-year span]

[Somewhat parallel, but a more confined instance of trying to get into federal courts rather than state, by diversity jurisdiction are two recent bank cases: *Horton v. Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004) and *Wachovia Bank, N.A. v. Schmidt*, 388 F.3d 414 (4th Cir. 2004). Each bank sought federal diversity jurisdiction under 28 U.S.C. § 1348 for routine commercial litigation. In *Wachovia Bank* the Fourth Circuit held that federal diversity jurisdiction was lacking; in *Horton*, the Fifth Circuit found that the association could avail itself of 28 U.S.C. § 1348 jurisdiction notwithstanding the traditional policy that it was not completely diverse since it was deemed a citizen of states in which it was located.]

PARTIES TO THE PROCEEDING

Petitioner Wallace R. Bennett is a Utah resident who initially invested with William Edwards Coutts & Partners Ltd., Members Agent of London, England in 1978. In 1986 a novation substantially increasing Bennett's financial commitment was signed and notorized under Lloyd's common seal in Salt Lake City, Utah by the above parties: The Agency Agreement [Doc. 32, Exh. "1"].

Respondent, "The Society of Lloyds ("Lloyds") is purportedly an atypical English "Corporation *and* Society" acting under the Lloyds Acts of 1871-1982. The Society has investors therein, denominated "Names." Wallace Bennett is a constituent Member Name (#24021C).

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Appendix B — Order Of The United States District Court For The District Of Utah, Central Division Dated And Filed December 12, 2002 ..... 45a

Petitioner Wallace R. Bennett, a long-retired professor of law emeritus acting *pro se*, respectfully submits this Petition for a Writ of Certiorari to the United States Supreme Court to review an Opinion and Judgment of the Court of Appeals for the Tenth Circuit. The Opinion, entered on March 23, 2005, is now published: *Reinhart v. Society of Lloyds*, 402 F.3d 982 (10th Cir. 2005). A related brief by Wallace Bennett, case no. 04-4142, not initially considered therein was added by amendment to the unchanged Judgment on May 6, 2005.

Certiorari is requested because hundreds of cases emanating from Lloyds of London and controlled entities have been and are coming to U.S. courts involving substantially similar investment constructs.

A first question is whether complete diversity of citizenship exists between real parties in interest as required for U.S. federal jurisdiction under the pleaded 28 U.S.C. § 1332.

If diversity were deemed properly to be present, a second aspect must be confronted: whether foreign-country judgment should be enforced in the U.S. based primarily on reputed fairness of the foreign (English) *system*, without including close consideration of the predicate federal jurisdictional ground on which execution is sought.

A final dimension is whether public policy expressed in case law, statutory law, constitutional law and equity enunciated by the forum state was understandingly applied by the lower federal courts in this foreign-nation case brought to the U.S. seeking federal enforcement collection.

OPINIONS BELOW

I. The United States District Court for the District of Utah issued a summary judgment that Wallace Bennett pay the Society of Lloyds "£ 415,679.50 being £ 379,687.49 principal and £ 44,992.01 interest together with costs to be taxed if not agreed". November 15, 2002 [Doc. 98] The ruling was without an evidentiary hearing, reproduced its findings referencing extant decisions elsewhere (not made pursuant to 28 U.S.C. § 1332), and lacked a comprehensive regard for the applicable controlling enforcement standards and safeguards of substantive law and equity of Utah, the forum state.

On December 2, 2002, District Judge Tena Campbell concluded in response to a Rule 59(e) Motion and Memorandum to Alter or Amend the Summary Judgment, which reflected a notion of an accommodating role in enforcement to be given an English Writ in U.S. federal courts:

> Although Mr. Bennett contends that new information raised questions about Lloyd's accounting tactics, this information is not relevant given the limited scope of ["facilitating"?] the underlying enforcement action.

[Doc. 101] [Bracketed comment added.]

II. A three - judge panel of the U.S. Court of Appeals for the Tenth Circuit held in an Opinion on March 23, 2005, reissued without substantive change May 6, 2005: "We must reject Mr. Bennett's assertions [Op. p. 39], and defenses" [Op. p. 42]. The court further found that Names could not advance "claims they might have against Lloyds or others as a set-off or counterclaim to their Equitas Premium" [Op. p. 11]. "Jurisdiction is proper pursuant to 28 U.S.C. § 1332 (a)(2)." [Op. p. 41]. "We must respect the ample process afforded by the English system of justice". [Op. p. 46].

As of the filing of this Petition for Certiorari, the Tenth Circuit Opinion has just been printed: *Reinhart v. Society of Lloyds*, 402 F.3d 982 (10th Cir. 2005).

III. A U.S. Bankruptcy judge would not allow any set-offs by the defendant debtor, relying on a decision of the Tenth Circuit Court. An almost eclipsing amount of £ 334,000 was in major contention, a recognized "agreed unsecured claim" against an affiliated managing agency of Lloyds, acknowledged in an advising letter belatedly received by Wallace Bennett in Salt Lake City, August 9, 2002 [Doc. 101, Exh. 3; Doc. 105: Affidavit filed Dec. 2, 2002, page 7 ¶¶ 32-35; and Doc. 178, ¶ 16].

JURISDICTION

The Supreme Court of the United States has jurisdiction of this case under 28 U.S.C. § 1254(1).

The Respondent "Society of Lloyds" invoked 28 U.S.C. § 1332 for jurisdiction to proceed in the United States District Court for Utah against Wallace Bennett.

The Petitioner, a citizen of the United States (Utah), invested with Edward Williams Coutts & Partners, Ltd. of London, becoming a "Member Name" in the Lloyds "community." [See definition of "Lloyds" as "encompassing all persons admitted as members of Lloyds": Doc. 30 p. 4 and Docs. 244, 247; *c.f.* description in the GENERAL UNDERTAKING: "Lloyds", "which expression shall include any officer or employee of Lloyds, any person in or to whom whether individually or collectively any powers or functions are vested or delegated by or pursuant to Lloyds Acts 1871 - 1982."]

The case was appealed to the Tenth Circuit Court of Appeals, where it was decided on March 23, 2005, reissued to include a brief of Bennett's, May 6, 2005.

Wallace Bennett's estate assets are presently within the jurisdiction of the U.S. Bankruptcy Court for Utah under Title 11 U.S.C. Chapter 7.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

A. UTAH CONSTITUTIONAL PROVISIONS

UTAH CONST. Article I, § 7 (Due process of law)

> No person shall be deprived of life, liberty or property, without due process of law.

UTAH CONST. Article. I, § 18 (Contract Impairment)

> No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.

UTAH CONST. Article. I, § 27 (Fundamental Rights)

> Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

B. U.S. STATUTES CITED

Title 28 United States Code, Section 1331 (1980)

Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 28 United States Code, Section 1332(a) (1996)

Section 1332 Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy

exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state; . . . .

Title 28 United States Code, Section 1359 (1948)

Parties collusively joined or made

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

Title 28 United States Code, Section 1441 (2002)

Section 1441(b) Actions not removable

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Title 28 United States Code, Section 1652 (1948)

The Rules of Decision Act:

State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

C. UTAH STATUTES CITED

Utah Uniform Securities Act, UTAH CODE ANN. § 61-1-1 *et al.*

UTAH CODE ANN. § 61-1-13 (2005) **Definitions**

(1) As used in this chapter:

(a) "Affiliate" means a person that, directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with a person specified.

(b)(i) "Agent" means any individual . . . who represents . . . an issuer in effecting or attempting to effect purchases or sales of securities.

* * *

(d) "Buy" or "purchase" means every contract for purchase of, contract to buy, or acquisition of a security or interest in a security for value.

* * *

(m) "Fraud," "deceit," and "defraud" are not limited to their common-law meanings.

* * *

(s) "Person" means an individual, a corporation, a partnership, a limited liability company, an association, a joint-stock company, a joint venture, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.

* * *

(v)(i) "Sale" or "sell" includes every contract for sale of, contract to sell, or disposition of, a security or interest in a security for value.

* * *

(x)(i) "Security" means any:

* * *

(G) certificate of interest or participation in any profit-sharing agreement;

* * *

(K) investment contract;

* * * *

UTAH CODE ANN. § 61-1-22 (1988)

61-1-22. Sales and purchases in violation — Remedies — Limitation of actions.

(4)(a) Every person who directly or indirectly controls a seller or buyer liable under Subsection (1), every . . . agent who materially aids in the sale are also liable jointly and severally.

* * *

(8) No person who has made or engaged in the performance of any contract in violation of this chapter . . . , may base any suit on the contract.

(9) A condition, stipulation, or provision binding a person acquiring a security to waive compliance with this chapter or a rule or order hereunder is void.

* * * *

[Bolding added.]

Title 70A – Uniform Commercial Code

UTAH CODE ANN. § 70A-1-106 (1965)

Remedies to be liberally administered.

(1) The remedies provided by this act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this act or by other rule of law.

(2) Any right or obligation declared by this act is enforceable by action unless the provision declaring it specifies a different and limited effect.

UTAH CODE ANN. § 70A-1-203 (1965)

Obligation of good faith.

Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement.

Title 78 – Judicial Code

UTAH CODE ANN. § 78-22b-107(3) (1990)

U.C.A. § 78-22b-107 Asserting and defending a foreign-money claim.

(3) Any party may assert a defense, set-off, recoupment, or counterclaim in any money without regard to the money of other claims.

UTAH CODE ANN. § 78-22b-114 (1990)

Supplementary general principles of law.

Unless displaced by particular provisions of this chapter, the principles of law and equity, including the law merchant, and the law relative to capacity to contract, **principal and agent**, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating causes supplement its provisions.

[Bolding added.]

STATEMENT OF THE CASE

I. Federal Diversity Jurisdiction Requirements of 28 U.S.C. § 1332

A designated plaintiff, "The Society of Lloyds", should not be accorded accommodating enforcement in the U.S. of an *en masse* summary U.K. Writ against an individual member of Lloyds, invoking federal diversity of citizenship jurisdiction, 28 U.S.C. § 1332; and not without due recognition of controlling Utah state law.

The Tenth Circuit Court all but apologized in its Opinion [Op., p. 32]:

> We have no choice under *Hilton* and *Rocky Mountain* but to examine the entirety of the foreign judicial ***system***, and not the particularity of individual judgments.

However, contrast the landmark case, *Hilton v. Guyot*, 159 U.S. 113 (1895), the last and only time the U.S. Supreme Court declared respecting the overall process to be followed. Rather than regarding an established system underlying a foreign country judgment as constituting justification for virtual per se enforcement in the U.S., the Court modeled an extensive comity review of relevant circumstances surrounding a French judgment for which execution was sought. The Court instructed:

> The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of plaintiff's claim.

> . . . *Judgment is reversed, and the cause remanded to the Circuit Court with directions to set aside the verdict and to order a new trial.*

Hilton at p. 227, ¶ 4 and at p. 229, ¶ 1. [Italicized in the opinion.]

Published analyses in leading law reviews are especially noteworthy. *See* e.g., *U.S. Securities Laws in International Transactions*, 97 COLUM. L. REV. 57 (1997):

> By enforcing the forum-selection and choice-of-law clauses at issue in the Lloyd's cases, the circuit courts have enabled private parties to contract out of statutory protections that Congress intended to be mandatory. In so doing, the courts have not given adequate consideration to the public policy issues that led to the enactment of the Securities Act and the Exchange Act.
>
> . . . *the circuit courts failed to justify their departure from Supreme Court precedents holding that substantive provisions of U.S. securities laws cannot be waived.*

Id., at p. 90, ¶ 3 and at p. 57, ¶ 2. [Italicized in original].

Clauses that prospectively disenable parties from pursuing statutory remedies have been questioned by the Supreme Court: *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) at p. 637 n.19, ¶ 2 quoted in *Vimar Seguros Y Reaseguros, S. A. v. M/V Sky Reefer*, 515 U.S. 528 (1995):

> . . . 1 Restatement (Third) of Foreign Relations Law of the United States § 482(2)(d) (1986) ("A court in the United States need not recognize a judgment of the court of a foreign state if . . . the judgment itself, is repugnant to the public policy of the United States"). Were there no subsequent opportunity for

> review and were we persuaded that "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies. . . , we would have little hesitation in condemning the agreement as against public policy."

Vimar Seguros, at p. 540, ¶ 2.

A telling analysis of Lloyd's course of business was made by Professor of International Law Emeritus Cortland H. Peterson in *Choice of Law and Forum Clauses and the Recognition of Foreign Country Judgments Revisited Through the Lloyd's of London Cases*, 60 LA. L. REV. 1259 (2000). Professor Peterson concluded by referencing an article published in England, THE GUARDIAN, January 11, 2000:

> Most fatal of all, though, was the instinct for secrecy [to which could be added: calculated deception].

60 LA. L. REV., at p. 1280, ¶ 3. [Bracketed comment added].

See also former CEO and Deputy Chairman of Lloyds (1983-1986) Ian Hay Davidson's LLOYD'S A VIEW OF THE ROOM: CHANGE AND DISCLOSURE (1987) confessing a pandemic: "These were not frauds on Lloyd's, they were frauds by insiders at Lloyds on their own members." *Id.* at 2, ¶ 4; John Greenwald, *Lloyds of London Falling Down: A Legendary Institution Stands Accused of Perpetrating a Staggering Fraud*, TIME, February 28, 2000 [Doc. 33, Exhibit 1].

Lloyd's own ONE LIME STREET magazine, *Syndicate Review Process Undertaken*, November 1996 gingerly understated damage to Names even upon a semi-independent audit attempt: "Without such information being available it is difficult for managing agents to demonstrate to monitoring teams that they have fulfiled [sic] their duty to ensure that in approving the

RITC premium equity between Names has been preserved." [Lloyds had strictly promised individual reporting, *cf.* "mutualized" pooling of Name accounts. Doc. *178.*] But recorded in a Hearing Transcript October 10, 2002, pp. 62-64 were admissions by Lloyds U.S. counsel in open court: "Now, what didn't happen is the Names were not allowed to go to syndicates and say give me your records or go to other Names and say give me your records. They were stopped at the level of Lloyd's who was doing the calculations and assembling everything." " [A] misrepresentation was that a, quote, rigorous system of auditing, unquote, was in place in order to estimate future liabilities upon which reinsurance premiums would be calculated. . . "]

An AGENCY AGREEMENT, entered into by Wallace Bennett, without negotiation, was made in trust on the fiduciary reputation of Lloyds of London for integrity: "utmost good faith". Yet the terms of that seminal 11-page, single-spaced preprinted document contained crafted details carrying lurking unforeseen consequences. The AGREEMENT between Wallace Reed Bennett ("the Name") and EDWARD WILLIAMS COUTTS & PARTNERS, LTD., "made the First day of January, one thousand nine hundred and eighty seven," provided critically *inter alia*:

> 1(a) Definition of "Syndicate" and designation of "the Agent" to act for this Name to sign . . . or accede to . . . all agreements . . . to which the Name may be required by the Council [of Lloyds] to become a party."
>
> * * *
>
> 6(a) The Agent shall comply with . . . requirements of the Council.
>
> [Query, even conflict-of-interest demands?]
>
> * * *

9(b) The Name shall pay any funds required by the Agent . . . free from and clear of any set-off, counterclaim or other deduction on any account whatsoever.

[Query, whether such a restriction would be enforceable in a final debt resolution between the parties in the U.S.?]

* * *

23. This Agreement shall be read and construed to take effect in all respects in accordance with English Law.

[Query, should this compel foregoing otherwise applicable substantive and procedural American case law, statutory, and constitutional safeguards?]

24. . . . the parties hereto irrevocably and unconditionally submit for all purposes to the exclusive jurisdiction of the English Courts.

[Query, compelling timeless deference from all non-U.K. courts in every circumstance?]

SIGNED, SEALED AND DELIVERED

Wallace Reed Bennett
and
Director(s) D. Robertson [Chairman]
M. Macpherson

[Bracketed queries added.] [N.B.: "The Society of Lloyds" was not mentioned in THE AGENCY AGREEMENT.]

In a one-and-a-quarter-page "GENERAL UNDERTAKING" predate - stamped "1 Jan. 1987", mechanically signed in London by an illegible "authorized signatory", "The Society

of Lloyds"/ Lloyds was described and defined as party thereto by a dangling solecism that mocked mutuality: "Lloyds", "which expression shall include any officer or employee of Lloyd's, any person in or to whom whether individually or collectively any powers or functions are vested or delegated by or pursuant to Lloyds Acts 1871-1982".

The GENERAL UNDERTAKING contained no "pay now/ sue later" clause as was inserted in a later unagreed Equitas arrangement. The GENERAL UNDERTAKING also stated, but probably never intended, that if "any term of this Undertaking shall to any extent be invalid . . . a substitute provision shall be negotiated by the parties. . . . "

After Wallace Bennett signed THE AGENCY AGREEMENT, Lloyds unilaterally caused a cascade of assignments wherein it orchestrated cash calls and other seizures on syndicate members for its superior interests. My agent contracting party, Edward Williams Coutts & Partners, Ltd. was wholly displaced by Lloyds without my consent with a "Substituted agent", CASTLE MEMBERS AGENCY (M.T. Senior, Chairman) [Docs. 32, 178]; and thereafter by "AUA9", identified as "ADDITIONAL UNDERWRITING AGENCIES LIMITED (No. 9), which the council proposes to appoint as a substitute managing agent for the syndicates to be reinsured by Equitas" [Doc. 244, p. 118]; and "Equitas" [Doc. 244, pp. 114-119].

Equitas was an unincorporated special-purpose creation of Lloyds. The Tenth Circuit Court found that this entity was to be "the assignor of Lloyds underlying claims against the Names". [Op. p. 40] . To set up the lawsuit at bar, Equitas circularly transferred interests to "The Society of Lloyds", the designated corporate Plaintiff herein. [Arguably, the purported "finality" refinancing imposed by Equitas was to "ring fence" Lloyds

(insiders) while "Names" remain still vulnerable for unquantified contingent liabilities].

Historic authority confirms the purposely narrow funnel of § 1332 federal diversity jurisdiction, including non-recognition of apparent assignments having dubious consideration.

> (1) "Congress has established the basic rule that diversity jurisdiction exists under 28 U.S.C. § 1332 only when there is complete diversity of citizenship. 'The policy of the statute calls for its strict construction.' . . . . To allow the requirement of complete diversity to be circumvented as it was in this case would simply flout the congressional command." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978) at p. 377, ¶ 1. [Citations and footnote omitted.]
>
> (2) "The burden of proving complete diversity exists rests upon the party who seeks to invoke the court's diversity jurisdiction". *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254 (5th Cir. 1988) at p. 1259, ¶ 1.
>
> (3) A recognized treatise summarizes that "Since the federal courts are courts of limited jurisdiction, there is a presumption against the existence of diversity jurisdiction in an action involving a natural person". WRIGHT, MILLER & COOPER, 13B FEDERAL PRACTICE AND PROCEDURE: JURISDICTION (2d ed. 1984), § 3611 at p. 516, ¶ 1.
>
> (4) "Thus, a presumption exists that all the stockholders of a corporation chartered by a foreign country are [for a diversity jurisdictional determination] citizens of that country . . . ." WRIGHT, MILLER & COOPER at § 3623 at p. 592, ¶ 2. [Bracketed wording added for clarity.]

(5) "[D]ecisions that fail to remark on a jurisdictional issue are not assumed to have resolved it by their silence." *Cook v. Winfrey*, 141 F.3d 322 (7th Cir. 1998) at p. 325, ¶ 3.

> It is axiomatic that a federal court must assure itself that it possesses jurisdiction over the subject matter of an action before it can proceed to take any action respecting the merits of the action. "The requirement that jurisdiction be established as a threshold matter 'spring[s]' from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Environment*, . . . 118 S.Ct. 1003, 1012. . . .

(6) "We also note the equally well-settled principle that an unincorporated association is deemed a citizen of every state in which its members reside." [thus precluding diversity] *Hummel v. Townsend*, 883 F.2d 367 (5th Cir. 1989) at p. 369, ¶ 10. [The Reorganized LDS Church was not allowed to bring a federal diversity of citizenship lawsuit against its individual members.]

(7) Confirming a conclusion that negates the complete divergence necessary under §1332 when agency relationships and the concept of respondeat superior are involved: "for Lloyds of London, diversity is determined by the residence of each name." O'CONNOR'S FEDERAL RULES * CIVIL TRIALS (2005) at p. 97.

(8) "The burden of proving diversity jurisdiction, when challenged, is upon the plaintiff. . . . " *Kaiser v. Loomis*, 391 F.2d 1007 (6th Cir. 1968) at p. 1010, ¶ 1. [Citation omitted.]

(9) "A district court shall not have jurisdiction of a civil action in which any party by assignment or otherwise has been improperly or collusively made or joined to invoke the jurisdiction of such court". *28 U.S.C. § 1359.*

(10) *Prudential Oil Corp. v. Phillips Petroleum Co.*, 546 F.2d 469 (2nd Cir. 1976) at p. 475, ¶ 5:

> . . . it was suggested by the Supreme Court almost a century ago that an intercorporate assignment between a parent and its subsidiary should be treated as presumptively ineffective for jurisdictional purposes.

(11) *Dweck v. Japan CBM Corporation*, 877 F.2d 790 (9th Cir. 1989):

> The facts in this case are similar to those involving assignments between parent and subsidiary corporations. . . . assignments between parent and subsidiary corporations "are presumptively ineffective to create diversity jurisdiction".
>
> "Section 1359 was designed to prevent parties from channeling a 'vast quantity of ordinary contract and tort litigation . . . into the federal courts. . . .' "
>
> The assignment was not supported by consideration. *See* 14 C. Wright, A. Miller &

> E. Cooper, *Federal Practice and Procedure* § 3639, at 109 (2d ed. 1985).

Dweck, at p. 792, ¶ 6 ; at p. 792, ¶ 7; and at p. 793, ¶ 3. [Case citations omitted.]

> The assignment in this case also failed to include provisions that expressly disavowed any continuing interest in the litigation or its proceeds on the part of the assignor.

Dweck, at p. 793, ¶ 3.

> (12) *Shields v. Barrow*, 58 U.S. 137 (1855) addressing very fundamental jurisdictional concepts declared:
>
> > It is apparent that, if it were in the power of a circuit court of the United States to make and enforce orders like this, both the article of the constitution respecting the judicial power, and the act of congress conferring jurisdiction on the circuit courts, would be practically disregarded in a most import particular.
> >
> > We do not find it necessary to pursue further an examination in detail, of the complicated maze of pleas, . . . which followed the filing of this, so-called, cross-bill. It is enough to say that the defendants to it were never lawfully before the court; that the court never obtained jurisdiction over those parties. . . .
> >
> > This court regrets that a litigation, which has now lasted upwards of thirteen years, should have proved wholly fruitless. . . .

Id., at 58 U.S. 153 ¶ 3, 17 How. 145 ¶ 3; at 58 U.S. 154 ¶ 3, 17 How. 146 ¶ 2; and at 58 U.S. 154 ¶ 4, 17 How. 146 ¶ 3.

(13) *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969):

> . . . the evident purpose of § 1359, lead us to conclude that . . . the assignment in question was "improperly or collusively made.
>
> . . . there can be little doubt that the assignment was for purposes of collection. . . .
>
> . . . motivated . . . to make diversity jurisdiction available. . . .
>
> If federal jurisdiction could be created by assignments of this kind, . . . a vast quantity of ordinary contract and tort litigation could be channeled into the federal courts at the will of one of the parties. Such "manufacture of Federal jurisdiction" was the very thing which Congress intended to prevent when it enacted § 1359 and its predecessors.

Kramer at pp. 826-827; at p. 827, ¶ 3; at p. 828, ¶ 1; and at pp. 828-829.

II. The Rules of Decision Act, 28 U.S.C. § 1652

Not factually present in the immediate case, but if complete diversity of citizenship under 28 U.S.C. §1332 were determined properly to exist, a related adjacent dimension overriding an outcome for Lloyds must be considered. Congress enacted The Rules of Decision Act, *28 U.S.C. § 1652* to implement a policy of judicial federalism in such a situation.

> **The laws of the several states**, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

[Emphasis added].

Constitutional-level cases apply this precept fully: *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (state substantive law); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) (invoking state equitable principles); and *Wainwright v. Goode*, 464 U.S. 78 (1983) ("[T]he views of the State's highest court with respect to state law are binding on the federal courts." *Id.*, at p. 84, ¶ 2; "The petition for certiorari is granted, the judgment of the Court of Appeals . . . is reversed, and the case is remanded. . . ." *Id.*, at p. 87, ¶ 3.)

A facet of the case becomes whether the " Society of Lloyds" constitutes the real party in interest herein to try to claim U.S. diversity of citizenship federal jurisdiction. The Seventh Circuit Court in *Indiana Gas Company, Inc. v. Home Insurance Company*, 141 F.3d 314 (7th Cir. 1998) (with Chief Judge Posner notably concurring) held that complete diversity jurisdiction was therein lacking, dismissing the case with these comparable specifics:

> Plaintiffs are incorporated . . . in Indiana, so the suit is untenable if any defendant must be treated as a citizen of Indiana.

Id., at p. 316, ¶ 1.

> An underwriting syndicate at Lloyd's has the personal-liability characteristics of a general partnership and the management structure of a limited partnership. It is not incorporated . . . the names "are natural persons and sole traders, subscribing to policies of insurance *each for his or her own part* and not one for the other. They are *members* of various syndicates" (emphasis added). . . . It follows that the underwriting syndicates have the citizenships of every name.
>
> What is more, the intersection of English law with the sixth circuit's rationale produces unfortunate

> implication. Recall that under English law the names *cannot* be sued by insureds.
>
> *Layne* is the only appellate opinion that has discussed syndicates' citizenship under § 1332. District courts are split. . . . We disagree with *Layne* and hold that the underwriting syndicates must be treated like partnerships when determining their citizenships.
>
> This approach reflects a strong reluctance to extend the diversity jurisdiction by judicial interpretation – a reluctance that has characterized the Supreme Court's jurisprudence ever since *Strawbridge* held that complete diversity is essential.

Indiana Gas, at p. 317, ¶ 3; at p. 319, ¶ 1; at p. 319, ¶ 2 ; and at p. 318, ¶ 2. [Italicized in the opinion itself.]

In this way the Seventh Circuit in *Indiana Gas* honored the tenor of U.S. Supreme Court cases respecting limitations on federal diversity of citizenship jurisdiction, explicitly disagreeing with an earlier Sixth Circuit case *Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d 39 (6th Cir. 1994).

In dismissing the case before it "for want of subject-matter jurisdiction", the *Indiana Gas* court emphatically remonstrated: ". . . a court has a duty to ensure that subject-matter jurisdiction is present even if the parties disregard the issue. . . ." *Id.*, at p. 319, ¶ 3 and at p. 316, ¶ 3.

As a foreign business enterprise still needing capital, Equitas / Society of Lloyds now tries to collect additionally from original investors in U.S. federal courts, predicated on diversity of citizenship jurisdiction. However, our federal judicial system is fundamentally to have federal-questions decided under 28 U.S.C. § 1331, while contract and tort matters are adjudicated in state forums, not under § 1332 on a diversity of citizenship rationale. Seen as a tactic of forum shopping,

Lloyds evidently eschewed bringing its English writ directly to Utah courts that have undoubted judicial power and are structurally constituted to docket and directly adjudicate contract enforcements and closely supervise supplemental-order specific debt collections.

Section § 1441(b), 28 U.S.C. and *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254 (5th Cir. 1988) at p. 1258, ¶ 3 reinforce the policy of § 1332 through a converse proposition: "But even if complete diversity does exist, the case may not be removed from state to federal court if any defendant is a citizen of the state in which the action is brought."

To achieve a status which might facilitate entree to U.S. federal diversity jurisdiction, Nicholas Demery chief counsel, London asserted a dual nature and capacity for Lloyds. [Contrast the disparate description - definition given in the GENERAL UNDERTAKING, *supra*. p. : ". . . any employee of Lloyds, any person in or to whom . . . any powers or functions are delegated. . . ."]:

> The Plaintiff Society of Lloyds ("Lloyds") is a Society and Corporation incorporated under Lloyds Acts 1871 to 1982, comprising all persons admitted as members of Lloyds.

[Refer Doc. 30, ¶ 4, p. 2 and Docs. 244, 247]

Respecting the requirement that "the laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States", federal courts are to apply state law and equity in § 1332 diversity of citizenship cases under the congressional Rules of Decision Act. The late eminent constitutional authority Charles Alan Wright emphasized this process in his monumental treatise, LAW OF FEDERAL COURTS (5th ed. 1994) at p. 397:

> The federal court must keep in mind . . . that its function is . . . to choose the rule it believes the state court, from all that is known about its methods in reaching decisions, is likely in the future to adopt.

[Which precept also has a broader significance pertinent to the particular § 1332 and Rules of Decision Act matter at bar: what otherwise might be precedent or persuasive reasoning else where in federal adjudications, even state decisions outside the forum state are not governing.]

III. The Outcome-Altering Consequence of Applying State Law of Utah to the Case at Bar

There is a comprehensive body of Utah law and equity for reference in contract construction and enforcement. The Utah Supreme Court in *St. Benedicts Dev. Co. v. St. Benedicts Hospital*, 811 P.2d 194 (Utah 1991), extensively mandated:

> In this state, a covenant of good faith and fair dealing inheres in most, if not all, contractual relationships. *See, e.g., Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 798 (Utah 1985) . . . ; *Resource Management Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1037 (Utah 1985) . . . ; *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 311 (Utah 1982) . . . ; . . . *Zion's Properties, Inc. v. Holt*, 538 P.2d 1319, 1321 (Utah 1975) . . . ; *Ted R. Brown and Assoc. v. Carnes Corp.*, 753 P.2d 964, 970 (Utah Ct. App. 1988). . . .
>
> For commercial contracts, a covenant of good faith is statutorily imposed. Utah Code Ann. § 70A-1-203. . . . *Bastian v. Cedar Hills Investment & Land Co.*, 632 P.2d 818, 821 (Utah 1981). . . .
>
> To comply with his obligation to perform a contract in good faith, a party's action must be consistent with the agreed common purpose and the justified expectations of the other party. Restatement (Second) of Contracts, § 205 comment a (1981).

St. Benedicts, at p. 199, ¶ 5; at pp. 199-200; and at p. 200, ¶ 2.

The **Supplemental general principles of law** stated in UTAH CODE ANN. § 78-22b-114, set forth verbatim p. 9, *supra*, were reiterated as overall policy. The Utah Uniform Securities Act §§ 61-1-13, 61-1-22, and Utah § 78-22b-107(3) were included. [Doc. 251, pp. 36-43].

A unanimous Utah Supreme Court in *Resources Management v. Weston Ranch and Livestock*, 706 P.2d 1028 (Utah 1985) announced tenets strikingly pertinent to Lloyds: unclear obligations, for and with whom; and a one-way out for the dominant contracting party:

> When there exists only the facade of a promise, i.e., a statement made in such vague or conditional terms that the person making it commits himself to nothing, the alleged "promise" is said to be "illusory. An illusory promise, neither binds the person making it, . . . nor functions as consideration for a return promise.
>
> [A]n implied covenant of good faith forbids arbitrary action by one party that disadvantages the other.
>
> One of the commonest kinds of promises too indefinite for legal enforcement is where the promisor retains an unlimited right to decide later the nature or extent of his performance. This unlimited choice in effect destroys the promise and makes it illusory.
>
> Substantive unconscionability is indicated by "contract terms so one-sided as to oppress or unfairly surprise an innocent party," . . . "an overall imbalance of the obligations and rights imposed by the bargain,". . . .

Id., at p. 1036, ¶ 7; at p. 1037, ¶ 5; at p. 1039, ¶ 4; and at p. 1041, ¶ 8.

The Utah Supreme Court in *Blodgett v. Martsch*, 590 P.2d 298 (Utah 1978) applicably held:

> The breach of a duty by a dominant party in a confidential relationship may be regarded as constructive fraud.

Id., at p. 302, ¶ 5. [Footnote reference omitted.]

In *Mori v. Mori*, 931 P.2d. 854 (Utah 1997) the Utah Supreme Court ordered dismissal of a Japanese decree upon a comity review:

> . . . The court reemphasized that unlike recognition of sister-state adjudications, the Full Faith and Credit Clause does not apply to foreign country judgments. *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 190 . . . (1912) ("No such right, privilege, or immunity, however, is conferred by the Constitution or by any statute of the United States in respect to the judgments of foreign states or nations. . . ."); *see also* . . . Restatement (Second) Conflict of Laws § 98 (Supp.1988). . . .

Mori, at p. 856, ¶ 2.

Lloyds did indeed obtain a writ in England and from there took my Letter of Credit; cash calls and draw-downs in cash (**$216,000**); "disallowed" Central Fund deposits and credits (amounts never disclosed); accessed reinsurance stop-loss recoveries (**£100,000**); denied a prorata share of proceeds from sale of the Lloyds tower building in London (owned by all Names); and foreclosed a recognized "agreed unsecured credit" claim upon an affiliated entity (Rose, Thomson, Young, managing agency) for **£334,000** [Docs. 32 and 178]. No verification of obligations or credited payments was ever permitted to Names by Lloyds.

There should not be allowed frustration of set-offs, a concept declared in Utah to be an equitable "*doctrine*": "to ensure substantial justice". *Collard v. Nagle Construction, Inc.*, 57 P.3d 603 (Utah App. 2002) at p. 609, ¶ 25:

> Under this doctrine, a defendant may even "utilize a counterclaim, normally barred by the statue of limitations, to offset a plaintiff's claim." *Coulon v. Coulon*, 915 P.2d 1069, 1072 (Utah Ct.App.1996). Recoupment is similar to offset and is utilized

> whether parties' claims arise from the same transaction. *See Mark VII Fin. Consultants Corp. v. Smedley*. 792 P.2d 130, 132-33 (Utah Ct.App.1990) (holding that although offset "refers to an unrelated transaction" and recoupment refers to "the same transaction," "the distinctions between recoupment, offset, and counterclaim have . . . been dissolved in Utah").

Collard, at p. 609, ¶ 23.

Current Utah Supreme Court Chief Justice Christine M. Durham presciently wrote in *Employing the Utah Constitution in the Utah Courts*, 2 UTAH BAR JOURNAL 25 (Issue No. 9, November 1989) at p. 25, ¶ 3:

> properly no federal issue is reached when the state's law protects the claimed right. . . . The right question is what the state's guarantee means and how it applies to the case at hand.

[Reference citations omitted.] *See also* Paul Wake, *Fundamental Principles and Individual Rights*, 1996 UTAH L. REV. 661 to this effect: Utah constitutional provisions and statutes may provide even greater individual protections than federal interpretations of similarly worded federal laws.

IV. Summary Critique of the Opinion of the Tenth Circuit Court

The Tenth Circuit Court pronounced consoling but ineffectual non-holdings seemingly without final consequence: "we find many of Lloyds acts to be distinctly distasteful" [Op., p. 15]; "the English courts found Lloyds guilty of negligence with respect to their Names" [Op., p. 10]; and that **Lloyds had been guilty of serious negligence and/or fraud**". [Op., p. 8] [Bolding added.].

Notwithstanding, the Tenth Circuit held [erroneously]: "the forum selection and choice of law clauses were conclusively enforceable in an execution proceeding thereon in Utah" [Op., p. 9]; that "We must respect the ample process afforded by the English system of justice." [Op., p. 46]; and that "Any suggestion [otherwise] . . . borders on the risible." [Op., p. 21]

Rather, the compelling thesis of this Petition for Certiorari is that a reverential respect for a foreign *system* (English) should not disregard predicate U.S. jurisdiction limitations, and applicable standards of American federalism.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DECIDED AND DATED MARCH 23, 2005, AMENDED MAY 6, 2005

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 02-2301

SOCIETY OF LLOYD'S,

Plaintiff-Appellee,

v.

RICHARD A. REINHART,

Defendant-Appellant.

No. 03-4065

SOCIETY OF LLOYD'S,

Plaintiff-Appellee,

v.

GRANT R. CALDWELL, DAVID L. GILLETTE, JAMES R. KRUSE, EDWARD W. MUIR, and KENT B. PETERSEN,

Defendants-Appellants.

Appendix A

No. 03-4082

SOCIETY OF LLOYD'S,

Plaintiff-Appellee,

v.

STEPHEN M. HARMSEN; KELLY C. HARMSEN,

Defendants-Appellants.

Nos. 03-4094 and 03-4183

SOCIETY OF LLOYD'S,

Plaintiff-Appellee,

v.

WALLACE R. BENNETT,

Defendant-Appellant.

Before **SEYMOUR, HENRY**, and **LUCERO**, Circuit Judges.

HENRY, Circuit Judge.

This consolidated appeal involves the Plaintiff-Appellee Lloyd's of London's request for the court's recognition and enforcement of money judgments issued by the High Court of Justice, Queen's Bench Division, London, England, in its favor against each of the defendants. Lloyd's obtained money judgments in England against each of the six New Mexicans

(the "New Mexico Names") and the nine Utahns (the "Utah Names") (collectively, the "Names") in connection with underwriting obligations. Lloyd's then brought actions in the United States District Court for the Districts of New Mexico and Utah seeking recognition of these judgments as final and enforceable, entitled to full faith and credit in New Mexico and Utah, respectively. Each federal district court granted summary judgment in favor of Lloyd's. Of the Utah Names, one defendant reached a settlement with Lloyd's, leaving eight in this litigation. Five of the six New Mexico Names reached settlements with Lloyd's. We have consolidated these cases for disposition on appeal.

On appeal, the New Mexico Name raises several arguments. First, he argues that the English judgment deprived him of due process under New Mexico's Uniform Foreign Money-Judgment Recognition Act. Second, the New Mexico Name maintains that the English judgment stemmed from an action that is repugnant to New Mexico's public policy as the judgment: (a) violates New Mexico's securities laws; (b) is based on unconscionable contracts; (c) stems from adhesion contracts; (d) comprises unlawful cognovit notes, (e) is based on illusory contacts; and (f) violates the New Mexico Unfair Practices Act.

The Utah Names offer similar arguments. They contend that the district court cannot enforce the English judgments under Utah law, because the English system of jurisprudence is incompatible with American standards of due process, and that they did not receive an opportunity for a full and fair trial. The defendants also maintain that the English judgments conflict with Utah public policy. One Utah Name questions

whether diversity jurisdiction exists, and also challenges the enforcement of the English judgments as violative of Utah securities laws. Two Utah Names also contend that the district court's approval of the English post-judgment interest of eight percent per annum was incorrect.

We hold that the Utah and New Mexico Names received due process under the English system of jurisprudence and that, in the thirty-two days of hearing before English trial and appellate courts, they received an opportunity for a full and fair trial. As to the New Mexico Name, specifically, the English legal proceedings provided ample due process pursuant to New Mexico's Uniform Foreign Money-Judgment Recognition Act. We also hold that the Lloyd's judgments are not repugnant to New Mexico's public policy.

As to the Utah Names, we hold that the English proceedings satisfied Utah's due process requirements and the English judgments do not conflict with Utah's public policy. We also affirm the district court's denial of a motion for discovery and a motion to certify questions of law to the Utah Supreme Court. We hold that the parties in this case are diverse, and that enforcement of the English judgments does not violate Utah's securities laws. Finally, we reverse the district court's determination that Lloyd's English judgments should accrue interest at the English post-judgment interest rate.

Appendix A

I. BACKGROUND

Numerous courts have summarized the basic facts applicable to the underlying litigation, and these facts are not in dispute. *See Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000); *Haynsworth v. The Corp.*, 121 F.3d 956 (5th Cir. 1997); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Soc'y of Lloyd's v. Webb*, 156 F. Supp. 2d 632 (N.D. Tex. 2001). We shall summarize the pertinent facts here, borrowing heavily from the detailed and well-reasoned *Webb* decision.

Lloyd's is not an insurer, but rather is the regulator of an insurance market located in London. Through Parliamentary Acts, specifically the Lloyd's Acts of 1871-1982, Parliament created Lloyd's and authorized it to regulate the English insurance market. Individual and corporate members of Lloyd's known as "Names" underwrite insurance. The New Mexico defendants and Utah defendants became Names in the Lloyd's market between the late 1970's and late 1980's.

The Names underwrite insurance by forming groups known as syndicates. Names are passive investors in the sophisticated scheme, but along with potential profits they may incur substantial personal and direct liability with respect to a portion of a syndicate's risk in the Lloyd's market. The liability of each Name is several rather than joint. As a condition of becoming members of Lloyd's, Names enter into agreements governing their membership in Lloyd's and their underwriting in the Lloyd's market. At issue here is the General Undertaking Agreement, which obligated the New Mexico and Utah Names, and all other Names, to comply

with the Parliamentary Acts under which Lloyd's was created and to submit any dispute arising out of their memberships or underwriting at Lloyd's to the English courts for resolution pursuant to English law. Each Name "irrevocably agree[d] that the courts of England [had] exclusive jurisdiction to settle any dispute" arising out of the underwriting of insurance business, and agreed that such "[p]roceedings brought in the English courts [were] conclusive and binding upon any party and may be enforced in the courts of any other jurisdiction." Case No. 02-2301, Aplts' App. vol. I, at 43 (General Undertaking Agreement).

By the early 1980's, which is about the time that Lloyd's solicited the Utah and New Mexico Names,

> Lloyds knew that it had problems with rising asbestos and toxic tort claims. The syndicates' reserves were inadequate to handle these rising claims and a committee known as the Asbestos Working Party was formed to gather information about the breadth of the problem. The problem was described as "the largest phenomenon that has ever hit the casualty insurance industry" and "the most significant legal and loss cost issue in the history of the industry." *Information about these claims was not published in the marketplace, was omitted from the audit instructions, and was not published in Lloyds financial statements for the year*. Although a letter was prepared that provided the necessary disclosures to the Names, it was merely placed in a file and never distributed to the intended Names. Simultaneously, Lloyds was

> campaigning in Parliament for passage of the Lloyds Act of 1982 which granted Lloyds and its governing body extraordinary bylaw-making powers and immunity. In exchange, Lloyds committed to providing better quality information to prospective Names. This promise was not fulfilled and Lloyds admitted to Parliament that it had not kept its promise. "The Council of Lloyds very much regrets that the undertaking to implement the recommendations . . . within 2 years of the Royal Assent has not been kept."

Webb, 156 F. Supp. 2d at 635 (emphasis supplied) (internal citations omitted).

According to former Name and lead plaintiff in the fraud action against Lloyd's, Sir Peter Jaffray, "[t]he only way they could keep going was to suppress the asbestos information, cook the books to ensure they were still showing profits and go after new investors." Case No. 02-2301, Aplts' App. vol. I, at 84 (Combined Mem. in Opp. to Summ. Judgment and in Support of Motion in Alt. for Discovery under Rule 56(c), Ex. 1 at 3 (*Lloyd's of London 1688 – ?*, TIME Feb. 21, 2002)). Further,

> [d]uring the five years that Lloyds failed to improve information disseminated to prospective Names, approximately 10,000 new Names had joined Lloyds, most of whom were U.S. investors.

Webb, 156 F. Supp. 2d at 635. The New Mexico and Utah Names contend that the Lloyd's representative emphasized

Appendix A

Lloyd's long history of profitability, its exclusive and selective members, its program of annual audits, and that the risk of "unlimited liability" had been of little consequence in Lloyd's three-hundred-year history. *See* Case No. 02-2301, Aplts' App. vol. I, at 276- 320 (Mem. in Opp. to Summ. Judgment, exs. 3-8 (Affids. from Utah Names)).

> For the years of account 1988 through 1992, Lloyds suffered losses in excess of £8 billion (these were reported in 1991-1995). Once the Names' inquiries into the cause for the losses began, they concluded that Lloyds had been guilty of serious negligence and/or fraud. . . .
>
> The Names eventually filed suits in numerous cities across the United States claiming fraud against Lloyds in connection with their recruitment as investors, their placement on high-risk syndicates and their continuing to underwrite at Lloyds. In each of the cases Lloyds moved to dismiss based on a forum selection (the forum being in England) and choice of law (the law being English) clauses contained in the General Undertaking (i.e., a contract) that the Names had signed. In each of the cases filed, the courts of appeals enforced the forum selection and choice of law clauses.

Webb, 156 F. Supp. 2d at 635-36 (internal citations omitted).

Apparently, the New Mexico Name and several Utah Names were parties to one of these suits, *Richards v. Lloyd's*

of London, 135 F.3d 1289 (9th Cir. 1998). The *Richards* complaint indicates that all but Utah Names Stephen and Kelly Harmsen and were plaintiffs. *See* Case Nos. 03-4064, -4082, -4094, -4193, Aple's Supl.App. vol. I, doc. 3 at 43-49.

The *Richards* litigation addressed and rejected the Names' contention that "their disputes with Lloyd's should be litigated in the United States despite contract clauses binding the parties to proceed in England under English law." *Richards*, 135 F.3d at 1292. The Ninth Circuit held that to invalidate the choice of law provisions in the Lloyd's General Undertaking Agreement would result in an "unbounded" reach of the United States securities laws, and would hamper international commerce. *Id.* at 1293. Moreover, the court stated that "[t]he Names have recourse against [Lloyd's] for fraud, breach of fiduciary duty, or negligent misrepresentation." *Id.* at 1296.[1]

We reached a similar conclusion in *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992). We rejected the plaintiff Name's contentions and held that

> English law does not preclude [the Name] from pursuing an action for fraud and we agree with

1. To the extent that Lloyds raises res judicata and collateral estoppel as affirmative defenses with respect to Mr. Bennett's arguments against the enforcement of the choices of law and forum, these matters are addressed in *Richards*, as discussed in § II(C)(4)(b), *infra*, and we hold such claims are precluded. Although Richards also discussed the policies of the anti-waiver provisions of the federal securities laws and referenced various state securities laws, *Richards* was limited to the choices of law and forum proceedings. To the extent the Names challenge the choices of law and forum under the state securities laws, these too are precluded. *See infra* § II(B)(2)(a).

> the Defendants that the Lloyd's Act does not grant statutory immunity for such claims. We have been shown nothing to suggest that an English court would not be fair, and in fact, our courts have long recognized that the courts of England are fair and neutral forums.

Id. (internal citations omitted). As such, trial proceeded in England. Following trial,

> the English courts found Lloyds guilty of negligence with respect to their Names and awarded the Names damages totaling £1 billion. Pursuant to the Lloyds' Act of 1982, however, the Lloyds' Council enacted a by-law that caused the funds awarded to the Names to be frozen. The Lloyds' Council placed Lloyds as trustee of the trust funds. The appellate court of England upheld Lloyds' right to freeze the funds and appoint Lloyds as trustee under the Lloyds Act of 1982.
>
> Because the losses were widely spread throughout the various syndicates, Lloyds developed a reorganization program in 1995-96 called Reconstruction and Renewal ("R & R"). This was a mandatory plan of reinsurance of all years of account prior to 1993 into one reinsurance company called Equitas Reinsurance Ltd. The available syndicate assets were £9.9 billion; yet the premium needed for the reinsurance (by December 31, 1995) was £14.7 billion. . . .

Webb, 156 F. Supp. 2d at 636 (internal citations omitted).

Appendix A

In implementing the reorganization plan, Lloyd's required each Name to become a party to the Equitas reinsurance contract through an appointed, substituted agent, who signed the contract on behalf of the Name. The Equitas contract contained a "pay now, sue later" clause that precluded Names from asserting claims they might have against Lloyd's or others as a set-off or counterclaim to their Equitas Premium. The Equitas contract also contained a "conclusive evidence" clause, which provided that, in the absence of manifest error, Lloyd's determination of a Name's Equitas premium was conclusive:

> The Equitas premium was mandatory and each Name was required to pay Equitas the amount shown on his statement. If, however, the Name signed the settlement agreement included in the R & R package, the Name would be awarded a credit, which would result in a reduction in the amount he paid in.

Id.

The New Mexico and Utah Names were Names who neither signed the settlement agreement nor paid the assessment. When they did not pay, Lloyd's used its by-law powers from the Lloyd's Act of 1982 to appoint a Substitute Agent. This Substitute Agent was instructed to sign the Equitas contract on behalf of the Names who refused to sign the Equitas settlement. Next, Lloyd's began suing these non-settling Names. Lloyd's paid Equitas the premium allegedly owed by the non-settling Names and received an assignment for the premium in exchange. In late 1996, Lloyd's then sued

the New Mexico and Utah Names (and all remaining non-settling Names) for the amounts paid on their behalf.

Lloyd's served a writ of summons on each of the New Mexico and Utah Names, notifying them of the commencement of the English action against them. Each of the Names filed an Acknowledgment of Service of Writ of Summons through their solicitors of record. Through the filing of the Acknowledgment, each Name appeared in the English Court and notified Lloyd's of his or her intent to contest the claim. Although other Names actively defended in the English litigation, the New Mexico and Utah Names did not submit a notice of intention to defend, nor did they contest Lloyd's claims.

Those Names who did defend presented common objections and defenses. They alleged that Lloyd's lacked the regulatory authority to pursue certain aspects of the reorganization program, that they were entitled to rescind based on fraud in the inducement of their underwriting at Lloyd's, that they were entitled to litigate these claims of fraud, and that they were not bound by the Equitas reinsurance contract's "pay now, sue later" and "conclusive evidence" clauses. The English court found in favor of Lloyd's and entered judgment against each of the defendants. *See Webb*, 156 F. Supp. 2d at 636 (citing English cases).

Specifically, the court found that the "pay now, sue later" clause was enforceable and the Names could not assert a fraud claim as a set-off to the Equitas premium due. At the trial level, several hearings were held regarding the premium amounts and the trial court concluded that Lloyd's produced

sufficient documents justifying the premiums it claimed. Subsequently, each Name had the opportunity to present evidence that the calculation of the premium was "manifest error" pursuant to the Equitas contract. The court ruled against the Names with respect to the "manifest error" claims. *See Webb*, 156 F. Supp. 2d at 636.

The English court did find, however, that Lloyd's could be sued for fraud damages and that the Names were free to pursue separate fraud claims against Lloyd's. Approximately two-hundred non-settling Names brought a fraud case in England against Lloyd's titled *The Society of Lloyds v. Jaffray*. The Honorable Justice Cresswell of the High Court of Justice of England and Wales issued a 635-page decision in the *Jaffray* litigation in November 2000 dismissing sample Names' claims for deceit and fraudulent misrepresentation after a trial spanning nineteen weeks. *See* 2000 WL 1629463 (Q.B. 3 Nov. 3, 2000), *aff'd*, Ct.App. Civ. Div. 26 July 2002.

In October 1999, while the *Jaffray* case was pending, the court issued an order requiring any Names wishing to bring a fraud claim against Lloyd's to join the *Jaffray* action. Lloyd's sent a copy of a statement regarding the terms of the Order to every Name who had not accepted Lloyd's Reconstruction and Renewal settlement offer, including each of the New Mexico and Utah Names. *See* Case No. 03-4002, vol. V, doc. 95 at 3. Neither the Utah Names nor the New Mexico Name gave notice that they reserved the right to advance such allegations or otherwise become parties to the *Jaffray* litigation.

The English judgments against the Names were affirmed on appeal. All appeals from the entry of the English judgments have been exhausted. Following these rulings, the English Court entered individual judgments in favor of Lloyd's against each of the New Mexico and Utah Names.[2] On March 8, 2002 Lloyd's filed this action to collect on the judgments.

II. DISCUSSION

The Names raise two overarching arguments regarding the errors of the New Mexico and Utah district courts: (1) the courts erred when they determined that the English proceedings provided due process to the Names; and (2) the courts erred when they found that the English cause of action did not violate the public policy of either New Mexico or Utah. They also challenge the district courts' denial of other motions, and two Utah Names challenge the calculation of post-judgment interest.

At the outset, we note that the Names' two principal arguments have been raised unsuccessfully in various federal

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2. As of March 7, 2002 the U.S. dollar amounts for the principal portions of the judgments were, in the aggregate, as follows:

Utah Names:	$1,757,549.31
New Mexico Name:	$ 262,124.54

See Case Nos. 03-4065, -4082, -4094, -4183, Aple's Supl.App. vol. I, doc. 1, at 15-18 (Complaint filed Mar. 8, 2002); Case No. 02-2301, Aplts' App. vol. I, at 16 (Complaint filed Mar. 8, 2002).

and state courts, by defendants from several states.[3] Although we affirm the grant of summary judgment to Lloyd's for largely the same reasons as our sister circuits, our analyses of the defenses brought by the New Mexico and Utah Names are slightly different because of the defenses the Names assert. Furthermore, Utah, unlike the states whose law was applied by each court that has addressed the issue, has not adopted the Uniform Foreign Money-Judgment Recognition Act. Although the decisions of the other courts are highly persuasive, we must detour slightly as we apply Utah's comity

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3. *See e.g.*; *Soc'y of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002) (affirming summary judgment for Lloyd's, under Uniform Foreign Country Money-Judgment Recognition Act, on grounds that English courts provide due process and enforcement of English judgment is not repugnant to Texas public policy); *Ashenden*, 233 F.3d 473 (7th Cir. 2000) (affirming summary judgment for Lloyd's under Illinois Uniform Foreign Money-Judgment Recognition Act, explaining that existence of due process in English courts is a "question . . . not open to doubt"); *Soc'y of Lloyd's v. Mullin*, 255 F. Supp. 2d 468, 476, 477 (E.D. Pa. 2003) (granting summary judgment for Lloyd's under Pennsylvania's Uniform Foreign Money Judgment Act, noting that "recognition of the English Judgment would not so offend Pennsylvania's notions of due process grounds," and that defendant's argument "fails to meet the high threshold for nonrecognition on public policy grounds"), *aff'd*, 96 Fed. Appx. 100 (3d Cir. May 5, 2004); *Soc'y of Lloyd's v. Grace*, 718 N.Y.S.2d 327, 328 (N.Y. App. Div. 2000) (affirming summary judgment for Lloyd's, explaining that "since the underlying English judgments are procedurally sound and do not violate any public policy of New York or the United States, they are entitled to comity"); *Soc'y of Lloyd's v. Baker*, 673 A.2d 1336, 1338 (Me.1996) (affirming summary judgment for Lloyd's and stating that the "application [of doctrine of comity] is a question of law that may be resolved by the court on a motion for a summary judgment") (citations omitted).

analysis to the assertions of the Utah Names. Although we empathize with the losses that the New Mexico Name and Utah Names have incurred, and we appreciate the sincerity of their arguments, and we find many of Lloyd's acts to be distinctly distasteful, the agreements the Names signed and the applicable law require that we must affirm the thorough and well-reasoned orders of the district courts, with one slight exception.

A. Standard of Review

We review the district court's grant or denial of summary judgment de novo, applying the standard applied by the district court pursuant to Federal Rule of Civil Procedure 56(c). *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1264 (10th Cir. 2004). "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and [ ] the moving party is entitled to judgment as a matter of law.' We view the evidence in a light most favorable to the non-moving party." *Id.* (quoting Fed. R. Civ. P. 56(c)).

B. New Mexico Law

The New Mexico Name contends that the district court erred when it failed to consider the procedures the English courts actually employed, and instead relied on the general proposition that the English courts are fair and neutral. The New Mexico Name also asserts that the enforcement of the English judgments violates New Mexico public policy. Applying New Mexico law, we hold that the district court appropriately assessed the English judicial system and no violation of due process or New Mexico public policy occurred.

Appendix A

1. Due Process concerns were met.

The New Mexico Name claims the district court failed to appreciate how its enforcement of the English judgment deprived him of his due process rights. While the Full Faith and Credit Clause applies to the recognition and enforcement of judgments among sister states, it does not apply to judgments rendered in foreign countries. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 322 n.4 (1981) (Stevens, J., concurring in the judgment) ("The Full Faith and Credit Clause, of course, was inapplicable . . . because the law of a foreign nation, rather than of a sister State, was at issue. . . ."). The parties cite no federal statute applicable to the enforcement of foreign court money judgments in U.S. courts, nor any applicable treaty. Instead, the recognition and enforcement of foreign judgments are governed by state law. *See See Transport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 582 (2d Cir. 1993) ("We note that . . . the recognition of foreign judgments is governed by state law."); *see* Restatement (Third) of the Foreign Relations Law of the United States § 481 cmt. a (1987).

New Mexico has adopted the Uniform Foreign Money-Judgment Recognition Act. *See* N.M. STAT. ANN. §§ 39-4B-1 to 39-4B-9 (1978). Pursuant to the Act, "[a] foreign judgment is not conclusive" if

> the judgment was rendered under a *system* that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

and it "need not be recognized if:"

> (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
>
> (2) the judgment was obtained by fraud;
>
> (3) the cause of action on which the judgment is based is repugnant to the public policy of this state. . . .

N.M. Stat. Ann. § 39-4B-5 (emphasis supplied).

The New Mexico Name contends that the New Mexico district court conflated the widely recognized general fairness of the English *system*, with this particular *judgment*, which, in his view, conflicts with his constitutional due process rights. Specifically, the New Mexico Name objects to (1) the English Courts' enforcement of the "pay-now, sue-later" clause, which prohibited him from raising certain defenses and counterclaims during the English action; (2) the "conclusive evidence" clause, because it renders the amount of the assessment determined by Lloyd's conclusive absent manifest error, and thereby fails to meet due process requirements; and (3) the fact that the cumulative effect of both these clauses is that the New Mexico Name could not receive a pre-deprivation hearing, could not obtain discovery as to the amount of Lloyd's claim, and could not challenge Lloyd's calculation of the amount due.

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As to whether the contested clauses, taken separately or together, amounted to a forfeit of the Name's due process rights, "[t]he question is not whether Lloyd's accorded due process to the names, but whether *the English courts* did. . . . Stated differently, the courts held that the names had waived their procedural rights in advance. . . ." *Ashenden*, 233 F.3d at 479 (emphasis supplied). Waiver of procedural rights in advance is clearly permitted, *see e.g.*, *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972) ("The due process rights to notice and hearing prior to a civil judgment are subject to waiver."). Moreover, given the New Mexico Name's "utter failure to participate in any stage of any of the English proceedings, 'we not only look with skepticism, but we flatly reject the due process complaint of a party who was given, and . . . waived, the opportunity of making the adequate presentation in the English Court.'" *Turner*, 303 F.3d at 331 n. 20 (quoting *British Midland Airways Ltd. v. Int'l Travel Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (internal quotation marks omitted)).

Although the New Mexico Name would prefer to have us focus on this particular *judgment*, rather than the English system, at this stage of these matters, we are not permitted to do so. *See* N.M. Stat. Ann. § 39-4B-5 (indicating that to determine "conclusive[ness]" of a "foreign judgment," a court examines the foreign country's "system" and whether it maintains "procedures compatible with the requirements of due process of law"). The procedures the English courts afford need not be identical to ours, they must only be compatible in that they do not offend the notion of basic fairness. *See Turner*, 303 F.3d at 331 ("the courts of England are fair and neutral forums") (footnoted citation omitted); *Hilton v. Guyot*, 159 U.S. 113, 205 (1895) ("[W]e are not prepared to hold that the fact that the

[foreign] procedure . . . differed from that of our own courts is, of itself, a sufficient ground for impeaching the foreign judgment."); Uniform Foreign-Money Judgments Recognition Act § 4 cmt. ("[A] mere difference in the procedural system is not a sufficient basis for non-recognition. A case of serious injustice must be involved.");1 Restatement (Third) of Foreign Relations § 482 cmt. b (1987) ("A court asked to recognize or enforce the judgment of a foreign court must satisfy itself of the essential fairness of the judicial system under which the judgment was rendered.").

And when we look to the basic fairness of the system, the answer is clear: "[O]ur courts have long recognized that the courts of England are fair and neutral forums." *Riley*, 969 F.2d at 958 (collecting cases); *see also Haynsworth*, 121 F.3d at 967 ("This is particularly so in the case of England, a forum that American courts repeatedly have recognized to be fair and impartial."). The Seventh Circuit similarly lauded the English system's regard for due process in its highly persuasive opinion involving nearly identical claims:

> Any suggestion that [the English] system of courts does not provide impartial tribunals or procedures compatible with the requirements of due process of law borders on the risible. [T]he courts of England are fair and neutral forums. The origins of our concept of due process of law are English. . . . and the English courts . . . are highly regarded for impartiality, professionalism, and scrupulous regard for procedural rights.

Ashenden, 233 F.3d at 476 (internal citations and quotations omitted).

We agree with the Seventh Circuit's reasoning and hold that given the structure of the English system, which is substantially similar to our own, the New Mexico Name's suggestion that the English court system does not provide tribunals compatible with due process is untenable. *See also Webb*, 156 F. Supp. 2d. at 640.

2. New Mexico's Public Policies were not violated.

The New Mexico Name also challenges the enforcement of the English judgments as a violation of New Mexico's public policy. First, he argues that Lloyd's violated the New Mexico Securities Act through its solicitation of unregistered securities and by making fraudulent representations. Second, he asserts that the Equitas contract is both procedurally and substantively unconscionable. Third, the New Mexico Name contends that the Equitas contract amounts to a contract of adhesion. Fourth, he asserts the Equitas contract is a "cognovit note," which both violates New Mexico public policy and New Mexico law. Fifth, he maintains that the Equitas contract is illusory. Finally, he contends the New Mexico Unfair Practices Act bars recognition of the Equitas contract.

Even if we assume the shaky premises of these assertions to be true (that Lloyd's made material misrepresentations and those misrepresentations would allow rescission under New Mexico law), we reject each of these claims for one overriding reason: English law as applied here does not violate New Mexico's public policy. As we iterate throughout the opinion, "[t]he view that every foreign forum's remedies must duplicate those available under American law would

render all forum selection clauses worthless. . . ." *Haynsworth*, 121 F.3d at 969; *see also Riley*, 969 F.2d at 958.

Furthermore, we reiterate that we must focus on the "cause of action" and the "claim for relief" underlying the English Judgment, not the differences in the bodies of law, because slight differences between England's and New Mexico's laws do not trigger the public policy exception. N.M. Stat. Ann § 39-4B-5(b)(3); *see Turner*, 303 F.3d at 332-33. Neither a breach of contract action nor a claim for money damages is repugnant to New Mexico public policy.

a. The State Agreement trumps the New Mexico Securities Act.

The New Mexico Name emphasizes that the New Mexico Securities Act embodies a public policy to protect New Mexico, and New Mexicans, and that the contract on which Lloyd's sued violated the state securities act. He relies heavily upon the declaration of Michael J. Vargon, Deputy Director of the Securities Division in the New Mexico Department of Regulation and Licensing. In an affidavit, Mr. Vargon states that after receiving various complaints from New Mexicans regarding Lloyd's solicitations to become Names, the Division concluded that the interest in the Names program was an investment contract and therefore a security, subject to the New Mexico Securities Act. Lloyd's failed to register these securities, and furthermore, "the information available to the Division strongly suggest[ed] fraud and misrepresentation in the inducement and continuing misrepresentation made to Names. . . ." Case No. 02-2301, Aplts' App. vol. I, at 325.

In response, Lloyd's points to the July 1996 State Agreement between Lloyd's and participating state securities regulators, including the Acting Director of the New Mexico Securities Division. The State Agreement recognizes that "certain State Securities Regulators have asserted the activities of Lloyd's . . . fall within the scope of their regulatory jurisdiction" and that "the activities of Lloyd's may have violated laws subject to their enforcement authority." *Id.* vol. II, at 747. The State Agreement also indicates that "Lloyd's denies it has violated any U.S. laws and denies it is subject to the jurisdiction of the States Securities Regulators with regard to the issues raised." *Id.*

The State Agreement appears to have been a necessary precursor to the enactment of the Reconstruction and Renewal plan. Under the State Agreement, Lloyd's promised to allocate credits to qualified State Names, in exchange for which the State Securities Regulators agreed to take steps necessary to terminate all proceedings and investigations pending against Lloyd's. In addition, the State Securities Regulators agreed not to "assist any private person or entity who seeks to pursue any action against Lloyd's. . . ." *Id.* vol. II, at 757. Because the Acting Director of the New Mexico Securities Division is a signatory to the State Agreement, and Mr. Vargon's declaration conflicts with the State Agreement, we reject the New Mexico Name's assertions based upon it. Furthermore, the New Mexico Name offers no explanation for this anomaly.

Moreover, as explained above, the New Mexico Name agreed in the General Undertaking Agreement that English law, not New Mexico law, would govern any disputes

between Lloyd's and him. The choice of law and choice of forum clause are not at issue in this litigation, and to enforce the New Mexico securities laws in this context would be inappropriate. *See Riley*, 969 F.2d at 958 (approving forum selection clause of General Undertaking Agreement); *Richards*, 135 F.3d at 1292 (holding the same as to the majority of the defendant Names in this case).

b. The English Judgments were not based on an unconscionable contract.

Next, the New Mexico Name invites us to examine the underlying contractual dispute through his contention that the Equitas contract is both procedurally and substantively unconscionable under New Mexico law. Procedural unconscionability is determined "by examining the circumstances surrounding the contract formation, including the particular party's ability to understand the terms of the contact and the relative bargaining power of the parties." *Guthmann v. LaVida Llena*, 709 P.2d 675, 679 (1985). "Factors to be considered include the use of sharp practices or high pressure tactics and the relative education, sophistication or wealth of the parties, as well as the relative scarcity of the subject matter of the contract." *Id.*

The New Mexico Name is a highly sophisticated investor who had to pass a "means" test and was required to post large sums of money as security for the unlimited liability that he knowingly undertook. Unquestionably Lloyd's presented no high pressure tactics: each Name was afforded the opportunity to read the General Undertaking Agreement in its entirety, and to fully understand the implications of its

terms. *See id.* at 680. The Equitas contract was not a new investment decision; it was the implementation of specific provisions to address the unlimited liability undertaken by all Names, pursuant to the General Undertaking Agreement's broad powers. There is no basis for concluding that there was any procedural unconscionability in the contracts on which the judgments were based.

The New Mexico Name's arguments regarding substantive unconscionability are equally unavailing. "Substantive unconscionability is concerned with contract terms that are illegal, contrary to public policy, or grossly unfair." *Id.* at 679. When terms are unreasonably favorable to one party a contract may be held to be substantively unconscionable. *Id.* at 680. "The terms are to be considered in the light of the general commercial background and the commercial needs of the particular trade or case." *Id.* (internal quotation marks omitted). Here, despite the apparently massive losses Lloyd's was absorbing, the terms of the General Undertaking Agreement were not so grossly unfair to the Names when the Agreement was formed. Approximately ninety-five percent of the Names accepted the subsequent Equitas contract, and forty-seven U.S. states signed the State Agreement to facilitate the Reconstruction and Renewal plan. Under these circumstances, we cannot say these were terms that "no man in his senses and not under delusion would make on the one hand, and . . . no honest and fair man would accept on the other." *Id.* (internal quotation marks omitted).

c. The English Judgments were not based on an adhesion contract.

The New Mexico Supreme Court's *Guthmann* holding also undergirds our rejection of the New Mexico Name's contention that the Equitas contract is an adhesion contract that violates New Mexico's public policy.

> Three elements must be satisfied before an adhesion contract may be found. First, the agreement must occur in the form of a standardized contract prepared or adopted by one party for the acceptance of the other. Second, the party proffering the standardized contract must enjoy a superior bargaining position because the weaker party virtually cannot avoid doing business under the particular contract terms. Finally, the contract must be offered to the weaker party on a take-it-or-leave-it basis, without opportunity for bargaining.

Id. at 678 (internal citations omitted). Here, the second and third elements are not met: the New Mexico Name was not in a weaker bargaining position nor did Lloyd's compel his investment.

d. The English Judgments were not based on a "cognovit note."

Next, the New Mexico Name contends that the General Undertaking Agreement and Equitas contract amount to a cognovit note, which is an ancient legal device "signed by a

defendant in an action actually commenced confessing the plaintiff's demand to be just, and empowering the plaintiff to sign judgment against him in default of his paying the plaintiff the sum due to him within the time mentioned in the cognovit." BLACK'S LAW DICTIONARY (8th ed. 2004); *see Overmyer*, 405 U.S. at 176. Thus the debtor agrees in advance to the entry of a judgment against him without notice or hearing. New Mexico public policy and New Mexico law prohibit cognovits and condemn judgments obtained through cognovits, enforcing them only where a defendant "voluntarily, knowingly and intelligently" waives his or her rights. As established above, the New Mexico Name did "voluntarily, knowingly and intelligently" waive his rights, in addition to receiving notice and being provided an opportunity to defend prior to the entry of the judgments. We have rejected the perceived lack of due process argument above, and consequently, this argument is foreclosed.

e. The English Judgments were not based on illusory contracts.

Next, the New Mexico Name maintains that Lloyd's judgments are repugnant to New Mexico's public policy because they are based on illusory contracts. Specifically, he contends that the General Undertaking Agreement and the Equitas contract lack consideration. The General Undertaking Agreement was part of the overall investment agreement between the Names and Lloyd's. The Agreement certainly placed obligations upon Lloyd's: when underwriting or investment profits were made, Lloyd's had to distribute to each Name his or her proper share. Likewise, the Equitas contract was supported by consideration: this reinsurance

contract helped Lloyd's survive and protected the Names from unlimited personal liability. The complaints about how Lloyd's may have met, or failed to meet, its obligations are another matter, which have also been considered by the English courts and in the *Jaffray* litigation.

f. The New Mexico Unfair Practices Act does not apply.

Finally, the New Mexico Name contends that the enforcement of the English judgment violates New Mexico's public policy because the contracts violated the New Mexico Unfair Practice Act, N.M. Stat. Ann. § 57-12-1 *et seq.* The Unfair Practice Act defines an unconscionable trade practice as any act or practice in connection with the sale for offering for sale of any goods or services that takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree or results in a gross disparity between the value received by a person and the price paid. *See id.* § 57-12-2(E). Neither party addresses whether the New Mexico Unfair Practice Act encompasses an action involving the interests of the New Mexico Name in underwriting insurance. *See, e.g., Russell v. Dean Witter Reynolds, Inc.*, 510 A.2d 972, 977-78 (1986) ("[Connecticut Unfair Trade Practice Act] does not apply to deceptive practices in the purchase and sale of securities" because "Connecticut has long separated regulation of the purchase and sale of securities from the regulation of unfair trade practices in other industries."); *Simpson v. Grimes*, 849 So.2d 740, 745-746 (La. Ct. App. 2003) ("Although the plaintiffs allege unfair trade practices pursuant to [the Louisiana Unfair Trade Practices Act], this type of action under the . . . Unfair

Trade Practices Act has been found inapplicable to cases involving securities.").

To the extent the New Mexico Name asserts that Lloyd's took unreasonable advantage of him through its misrepresentation regarding asbestos claims, the English courts have considered and rejected such claims. As above, we cannot allow the New Mexico Name to relitigate the underlying cause of action under New Mexico law, despite his attempt to frame the action as violating New Mexico public policy.

C. Utah Law

Turning to the defenses of the Utah Names, we hold that these defenses fail for similar reasons. The Utah Names first assert that the district court improperly analyzed Utah's principles of comity when it determined that the process underlying the English judgments comported with constitutional norms of due process and of Utah public policy. Specifically, the Utah Names contend they did not have a full and fair trial in England, because they were bound by unlawful contracts, prohibited from asserting affirmative defenses, and prohibited from discovering or presenting evidence to refute the existence of the amount of liability. Utah Names Stephen and Kelly Harmsen raise the related argument that Lloyd's made material misrepresentations when it induced them to become Names in the Lloyd's market by failing to disclose information about potential asbestos and toxic tort liability. As a result, neither the forum selection clause nor the "pay-now, sue-later" clause should be held enforceable as matters of public policy.

The Utah Names also argue that they were entitled to discovery, and that the district court should have certified certain questions of law to the Utah Supreme Court. Utah Name Wallace Bennett contends that the district court lacked diversity jurisdiction, and that the enforcement of the judgment violates Utah's securities laws. Finally, Utah Names Stephen and Kelly Harmsen also challenge the district court's imposition of eight percent per annum post-judgment interest. With the exception of the post-judgment interest argument, we reject each of the Utah Names' contentions.

1. Principles of comity apply in this case.

Unlike New Mexico, Utah has not adopted the Uniform Foreign-Money Judgment Recognition Act. The Utah Supreme Court has indicated that a foreign country judgment can be enforced in Utah courts "under principles of comity." *Mori v. Mori*, 931 P.2d 854, 856 (Utah 1997) (citing *Hilton*, 159 U.S. 113). Under the Supreme Court's holding in *Hilton*, the principles of comity require recognition of a foreign judgment if

> (1) there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction,
>
> (2) conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant,
>
> (3) under a *system* of jurisprudence likely to secure an impartial administration of justice

> between the citizens of its own country and those of other countries,
>
> (4) there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or
>
> (5) no other special reason exists indicating why the comity of this nation should not allow it full effect.

Hilton, 159 U.S. at 202 (emphasis added).

According to the Utah Names, and in seeming contrast to *Hilton*, Utah's comity requires an analysis of the fairness of the English *judgment*, not merely of the English judicial *system*. The judgment here was based upon the Utah Names' signing the General Undertaking, which is a standardized contract between Lloyd's and the individual Names. According to the Utah Names, their assent to the General Undertaking resulted in their unknowing waiver of future due process rights in the Equitas contract.

Utah law provides that questions regarding the validity of a foreign judgment "should be tested by the law of the jurisdiction where the judgment was rendered." *Rocky Mtn. Claim Staking v. Frandsen*, 884 P.2d 1299, 1300-01 (Utah Ct.App.1994). We have no choice under Hilton and Rocky Mountain but to examine the entirety of the foreign judicial system, and not the particularity of individual judgments. *See also* 1 Restatement (Third) of Foreign Relations § 482

cmt. b (1987) ("A court asked to recognize or enforce the judgment of a foreign court must satisfy itself of the essential fairness of the judicial system under which the judgment was rendered."). Like all the other circuits that have examined the question, we have already determined that the English judicial system is procedurally above reproach. *See, e.g. Ashenden*, 233 F.3d at 478 ("Even if the [defendants'] approach is valid–and we want to emphasize our belief that it is not–it cannot possibly avail the defendants here unless they are right that the approach requires subjecting the foreign proceeding to the specifics of the American doctrine of due process."); *see also Hilton*, 159 U.S. at 205 ("[W]e are not prepared to hold that the fact that the [foreign] procedure . . . differed from that of our own courts is, of itself, a sufficient ground for impeaching the foreign judgment.").

Here, for the sake of completeness, the district court looked to the underlying decisions rendered by the English courts that have considered and rejected each of the Utah Names' challenges to the "pay-now, sue-later" and "conclusive evidence" clauses. Case No. 02-2301, Aple's Supl.App. at 230 (Utah Dist. Ct. Order filed Nov. 12, 2002). The "pay-now, sue-later" provision left the Names free to pursue claims of fraud against Lloyd's in a separate proceeding, which many Names pursued unsuccessfully in the *Jaffray* litigation. *See id.* (citing *Soc'y of Lloyd's v. Wilkinson & Others*, at 17, 21 (Q.B. 23 Apr. 1997), *aff'd Soc'y of Lloyd's v. Lyon, Leighs & Wilkinson* (C.A. 31 July 1997) (Case Nos. 03-4065, -4082, -4094, -4183, Aple's Supl.App. vol. III, doc. 4, ex. J, at 682)).

Appendix A

The district court observed that the English courts held that the "conclusive evidence" clause was "not an unusual type of clause and [was] in principle appropriate to [the] contract." Case No. 02-2301, Aple's Supl.App. at 230 (quoting *Soc'y of Lloyd's v. Fraser & Others*, at 27 (C.A. 31 July 1998) (Case Nos. 03-4065, -4082, -4094, -4183, Aple's Supl.App. vol. III, doc. 4, ex. J, at 707)). Furthermore, the English courts "considered and rejected the argument that the Names should not be bound by the Equitas contract." Case No. 02-2301, Aple's Supl.App. at 230 (citing *Soc'y of Lloyd's v. Fitzgerald, Leigh and Others*, (Q.B. 20 Feb. 1997), *aff'd, Soc'y of Lloyd's v. Lyon, Leighs & Wilkinson* (C.A. 31 July 1997) (Case Nos. 03-4065, -4082, -4094, - 4183, Aple's Supp, App. vol. III, doc. 4, ex. J, at 622)).

We must reject the Utah Names' contentions that they were bound by unlawful contracts, that they were prohibited from asserting affirmative defenses, and that they were prohibited from discovering or presenting evidence to refute the existence of amount or liability. We therefore agree with the district court that the Utah Names were given a full and fair opportunity to litigate their claims before the English courts.

Similarly, we must reject the defenses mounted by the Harmsens. The English court considered and rejected the allegations involving material misrepresentations made by Lloyd's in connection with the solicitation of investment by potential Names.

2. The District Court did not Abuse its Discretion when it Denied Discovery.

The Utah Names sought discovery regarding (1) information about the basis for the amount of the alleged liability set forth in the English judgments; (2) information relating to Lloyd's appointment of the substitute agent and other details regarding the formation of the Equitas contract; and (3) information concerning Lloyd's contractual intent in entering into the General Undertaking Agreement.

Discovery rulings are generally within the sound discretion of the trial court, and we review only for abuse of discretion. *GWN Petroleum Corp. v. OK-Tex Oil & Gas, Inc.*, 998 F.2d 853, 858 (10th Cir. 1993). The discovery sought by the Utah Names was unnecessary to the district court's grant of summary judgment in favor of Lloyd's. To have granted the discovery would have resulted in a relitigation of the underlying General Undertaking Agreement and Equitas contract, both of which have been considered and litigated before the English courts. After reviewing the record, we find no abuse of discretion regarding the rulings on these motions.

3. Certification of Questions of State Law

The Utah Names suggest that (1) the district court erred when it refused to certify certain questions to the Utah Supreme Court and (2) we should sua sponte certify the questions of whether the English court met the "open courts provision" of the Utah Constitution. We reject each contention and hold that the district court did not abuse its discretion.

a. District court's denial of the motion was not an abuse of discretion.

We review the district court's decision not to certify questions of state law for abuse of discretion. *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988). Utah's open courts provision requires:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

UTAH CONST. art. I, § 11.

In general, open courts provisions in Utah serve two principal purposes: "First, they were intended to help establish an independent foundation for the judiciary as an institution. . . . Second, open courts or remedies clauses were intended to grant individuals rights to a judicial remedy. . . ." *Laney v. Fairview City*, 57 P.3d 1007, 1016 (Utah 2002). The Names attempt to invoke the open courts provisions in connection with their alleged waiver of their at the time-unknown due process rights.

While certification is appropriate "where the legal question at issue is novel and the applicable state law is unsettled," *Allstate Ins. Co. v. Brown*, 920 F.2d 664, 667 (10th

Cir. 1990), it is never compelled. *See Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). "[U]nder the diversity statutes the federal courts have the duty to decide questions of state law even if difficult or uncertain." *Copier v. Smith & Wesson Corp.*, 138 F.3d 833, 838 (10th Cir. 1998) (citing *Meredith v. Winter Haven*, 320 U.S. 228, 235 (1943)). There is little caselaw suggesting that English law or any foreign law somehow abrogates the Utah Constitution. We have established there is no due process violation and that the Names waived their procedural rights in advance. *See Overmyer*, 405 U.S. at 185. The district court did not abuse its discretion when it rejected the Utah Names' motion to certify.

b. Sua sponte certification is unnecessary here.

We next consider whether we should certify this question to the Utah Supreme Court directly. Utah Rule of Appellate Procedure 41(a) states:

> The Utah Supreme Court may answer a question of Utah law certified to it by a court of the United States when requested to do so by such certifying court acting in accordance with the provisions of this rule if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain.

Thus, there is a procedural mechanism for certification to the state court that we may consider using. However, we note that a necessary but not controlling component is the difficulty in determining the local law. *Cf. Lehman Bros.*,

416 U.S. at 390 ("[T]he mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit."). *Lehman Brothers* further noted that "[w]e do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory." *Id.* at 390-91.

While no Utah court has rendered a decision on the precise issue in question, our analysis above establishes that there is no unusual difficulty in deciding the state law question or a likelihood that Lloyd's theory of liability would be adopted by the Utah courts. Thus, given the above conclusions, certification is unnecessary.

4. Outstanding Issues Presented by Utah Name Mr. Bennett

Mr. Bennett maintains there is not complete diversity between the parties, and he challenges the district court's enforcement of the English judgments as a violation of Utah securities law. He also raises defenses we have previously rejected. We address each defense briefly.

a. Diversity jurisdiction is present.

Mr. Bennett contends that Lloyd's is not a corporation, but is rather more like an association, which adopts the citizenship of each of its syndicate investment members. "Lloyd's and Equitas are merely agents for the syndicates, collecting cash calls from syndicate investor Names to pay off the liabilities arising from syndicate insurance policies." Bennett Rep. Br. at 5. Under this interpretation, "Lloyd's

attempt to claim federal diversity jurisdiction is a sham" and there is no federal subject matter jurisdiction. *Id.*

We must reject Mr. Bennett's assertions. Early on, Lloyd's may have been a form of an unincorporated association, but under the Lloyd's Act of 1871, the company was incorporated. Although we agree that Lloyd's is not a corporation within the traditional sense of the word, *see Ashenden v. Lloyd's of London*, 934 F. Supp. 992, 998-99 (N.D.Ill.1996), there is no challenge to or question regarding Lloyd's place of incorporation (it is duly incorporated under the laws of England). Similarly it maintains its principal place of business in London, England. These facts are unchallenged, and comprise the weightiest part of our inquiry. *See id.* (noting that the most important consideration is Supreme Court precedent "indicating that the citizenship of business entities must be determined by the simple fact of legal incorporation or the lack thereof, rather than the nature or attributes of the entity in question."). We thus hold that the jurisdiction is proper pursuant to 28 U.S.C. § 1332(a)(2). Equitas Reinsurance, Limited (the assignor of Lloyd's underlying claims against the Names) is also a duly incorporated English company formed under the laws of England, and Mr. Bennett's similar allegations against Equitas must also fail.

b. The Utah Securities Act offers Mr. Bennett no relief.

Mr. Bennett points to the Utah Securities Acts' "anti-waiver" provision as a bar to the enforcement of the English judgments. The anti-waiver provision declares that

"a condition, stipulation or provision binding a person acquiring a security to waive compliance with the chapter or rule hereunder is void." Utah Code Ann. § 61-22(9).

We note that the anti-waiver provisions of the Securities Acts of 1933 and 1934 are substantially the same as those found in the Utah statute. *See* 15 U.S.C. § 77n (1982) ("Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."); 15 U.S.C. § 78cc(a) (1982) ("Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.").

The district court determined that our holding in *Riley* precluded enforcement of state as well as federal securities statutes. *See Riley*, 969 F.2d at 956. In *Riley*, the plaintiff claimed that Lloyd's engaged in the offer and sale of unregistered securities and made untrue statements of material fact and material omissions in connection with the sale of securities, violating both federal and Colorado's state securities laws. By enforcing the General Undertaking Agreement's forum selection clause requiring the application of English law, we did not deprive Mr. Riley of his day in court, but rather instructed Mr. Riley to "structure his case differently than if proceeding in federal district court." *Id.* at 958. Thus, we cannot accept Mr. Bennett's contentions and note that, as in the Ninth Circuit's decision in Richards (litigation to which Mr. Bennett was a party), "[w]e disagree with the dramatic assertion that the available English

remedies are not adequate substitutes for the firm shields and finely honed swords provided by American securities law." *Richards*, 135 F.3d at 1296.

c. Mr. Bennett's remaining defenses are unavailing.

Mr. Bennett's remaining claims duplicate the Utah Names' arguments, or are without merit. For example, he challenges whether the General Undertaking Agreement can be binding upon him. He suggests that Lloyd's engaged in breaches of fiduciary duty, concealment and material misrepresentations because the General Undertaking does not warn a committing investor that he or she might later be made subject to an entirely different undertaking. Mr. Bennett also contends that the district court erred in its application of *Hilton*. For the reasons given above, we reject all of Mr. Bennett's defenses.

5. Post-Judgment Interest

Finally, Utah Names Stephen and Kelly Harmsen challenge the district court's application of an eight percent per annum post-judgment interest rate. They argue that once the federal district court enforced the judgments, the then-applicable interest rate of 1.16% was applicable.

We review de novo the district court's interpretation and application of 28 U.S.C. § 1961. *O'Tool v. Genmar Holdings, Inc.*, 387 F.3d 1188, 1207 (10th Cir. 2004).

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . .

> Such interest shall be calculated from the date of the entry of the judgment at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding.

28 U.S.C. § 1961(a). "This section shall not be construed to affect the interest on any judgment of any court not specified in this section." *Id.* § 1961(c)(4).

The district court reasoned that the English court is not a court specified by § 1961, and because the Names agreed that English law would govern the litigation, the post-judgment interest rate should be determined by English law, which would be 8%. Lloyd's argues that because the Names agreed to be bound by English law, English post-judgment interest applies. Furthermore, Lloyd's rejects the Harmsens' suggestion that the English judgments merge into the U.S. judgments.

We disagree with such reasoning. First, we acknowledge that parties may contract to, and agree upon, a post-judgment interest at a rate other than that specified in § 1961. *See Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 101 (2d Cir. 2004) ("We agree that parties may by contract set a post-judgment rate at which interest shall be payable."). However, agreeing to be bound by English law does not amount to agreeing to a particular post-judgment interest rate. The general rule under federal and Utah law is that "when a valid and final judgment for the payment of money is rendered, the original claim is extinguished, and a new cause

of action on the judgment is substituted for it. In such a case, the original claim loses its character and identity and is merged in the judgment." *See Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260, 269 (2d Cir. 1989); *Yergensen v. Ford*, 16 Utah 2d 397, 402 P.2d 696, 697 (1965). "If parties want to override the general rule on merger and specify a post-judgment interest rate, they must express such intent through clear, unambiguous and unequivocal language." *Westinghouse Credit Corp.*, 371 F.3d at 102 (internal quotation omitted). Such language is not present in the agreements before us.

Second, the policies behind § 1961(a) support the application of the U.S. interest rate. "The purpose of postjudgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the [judgment] and the payment by the defendant." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835-36 (1990) (quotations and alterations omitted). It preserves the value of the award as originally decided, affording neither party a benefit.

> [T]he universal application of Section 1961 to all types of claims makes for logical uniformity. Once a claim is reduced to judgment, the original claim is extinguished and merged into the judgment; and a new claim, called a judgment debt, arises. *See* RESTATEMENT OF JUDGMENTS § 47 (1942). A single rule should govern interest on any such debt, the nature of the original claim having become irrelevant under the doctrine of merger.

Kotsopoulos v. Asturia Shipping Co., 467 F.2d 91, 95 (2d Cir. 1972).

Thus, the federal rate reflects the economic conditions at the time the district court rendered its judgment, and, despite the disparity between the rates, we must apply § 1961(a), so interest accrues under the federal rate from the time the federal district court entered an order enforcing the judgment. *See Carte Blanche*, 888 F.2d at 268 (noting the provisions of § 1961(a) are mandatory).

We note that the application of § 1961 also fosters stability and certainty in international commercial transactions. Moreover, it provides "make whole" relief without overcompensating Lloyd's. Lloyd's derives various benefits from utilizing the federal court system to procure the execution and enforcement of its judgments. In return, Lloyd's is subject to the federal formula for determining an equitable post-judgment interest.

Finally, as to the district court's concerns with the limitations provided in § 1961(c)(4), we agree that the U.S. post-judgment interest rate applies to the district court's judgments, but not to the English court's judgments. The U.S. post-judgment rate should apply as of the date of the entry of the judgment in the U.S. district court.

Here, the eight percent figure appears to have been calculated in 1993, five years before the entry of the English judgment. *See* Case Nos. 03-4065, - 4082,-4064, -4183, Aple's Supl.App. vol. IV, at 995-96 (Section 17 of the Judgments Act of 1838 as amended by Statutory Instrument 1993 564(L.2) and provision of the Civil Procedure Rule 1998). The federal rate is calculated on a more current weekly basis, and better reflects the value of the award once entered in the United States.

Therefore, on remand, we instruct the Utah district court to clarify that the English post-judgment rate applies to the Harmsens' judgments from the entry of the English judgment (March 11, 1998) until the entry of the U.S. judgment enforcing the English judgment (November 2002) and that the federal rate, calculated pursuant to § 1961, applies thereafter.

III. CONCLUSION

There is no question that the New Mexico and Utah Names suffered substantial losses after investing in what had been, for three centuries, a well-regarded institution. There is also no question that Lloyd's was not forthcoming with all the information regarding its substantial financial losses. However, the English courts thoroughly and fairly considered and examined the plight of the Names before entering judgments against them. We must respect the ample process afforded by the English system of justice.

We affirm the New Mexico and Utah district courts' grants of summary judgment to Lloyd's. We reverse and remand with respect to the post-judgment interest as applied to the Harmsens' judgment, with instructions to recalculate the post-judgment interest in accordance with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED AND FILED NOVEMBER 12, 2002

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Case No. 2:02-CV-204TC

THE SOCIETY OF LLOYD'S

Plaintiff,

vs.

WALLACE R. BENNETT, GRANT R. CALDWELL, CALVIN P. GADDIS, DAVID L. GILLETTE, STEPHEN M. HARMSEN, KELLY C. HARMSEN, JAMES R. KRUSE, EDWARD W. MUIR, and KENT B. PETERSEN,

Defendants.

ORDER

Plaintiff The Society of Lloyd's ("Lloyd's") filed this lawsuit to enforce money judgments it had obtained against the Defendants in England. Lloyd's has now filed the present Motion for Summary Judgment. For the reasons explained below, Lloyd's Motion for Summary Judgment is hereby GRANTED.

Appendix B

Various parties have also filed a number of motions, all of which are collateral to the Motion for Summary Judgment. The court's decision as to each of these motions is set forth in this Order.

BACKGROUND

1. *Factual Background*

Through Parliamentary Acts—the *Lloyd's Acts* 1871-1982—the United Kingdom Parliament has created and authorized Lloyd's to regulate the English insurance market. Lloyds promulgates and enforces regulations under the *Lloyd's Acts,* and exercises disciplinary authority over persons in the Lloyd's markets.

In Lloyd's, individual and corporate members known as "Names" underwrite insurance. The U.K. *Insurance Companies Act* permits Names to conduct insurance business only as long as they become and remain subject to Lloyd's regulatory jurisdiction.

As a condition of becoming members of Lloyd's, Names, including the Defendants, entered into agreements governing their membership in Lloyd's and underwriting in the Lloyd's market. Among these agreements and central to the issues in this lawsuit is the General Undertaking. In the General Undertaking, Defendants agreed, in part, (1) that they would comply with the provisions of the *Lloyd's Acts* 1871-1982 and any bylaws or regulations promulgated thereunder in connection with their membership of and underwriting at Lloyd's; and (2) that any dispute arising out of or relating to

their membership of and underwriting insurance business at Lloyd's would be resolved in English courts pursuant to English law. Pursuant to the *Lloyd's Acts*, Names could only participate in the Lloyd's market through an underwriting agent, who would contractually assume management responsibilities over Names' underwriting activities.[1]

Names underwrite insurance by forming groups known as "syndicates." Names' liability is several rather than joint. Each of the Defendants incurred liabilities with respect to insurance commitments that he or she undertook by assuming a portion of a syndicate's risk in the Lloyd's market. In order to close the syndicate at the end of each underwriting year of account, reinsurance is purchased to cover any outstanding liabilities as well as liabilities that have been incurred but not reported.

Underwriting in the Lloyd's market was historically a profitable venture. In the late 1980s and early 1990s, however, Names in the Lloyd's market incurred substantial losses. As a result of these losses, Names underwriting in those years were unable to purchase affordable reinsurance for their outstanding liabilities, thus facing open-ended liabilities. Many Names defaulted on their underwriting obligations as they came due, putting policyholders at risk of non-payment.

To address these issues, Lloyd's devised the reconstruction and renewal ("R&R") plan. The R& R plan provided reinsurance otherxise unavailable to each Name in

1. This underwriting agent is not to be confused with the substituted agent, discussed below, whom Lloyd's appointed to implement its reconstruction and renewal ("R&R") plan.

respect to his or her pre-1993 underwriting obligations through a newly formed company, Equitas Reinsurance Ltd. ("Equitas"). The R&R plan also provided an offer of settlement (the "Settlement Offer") to each Name with pre-1993 underwriting liabilities to end litigation and assist the Names in meeting their underwriting obligations. According to Lloyd's, the cost of reinsuring each Name's pre-1993 liabilities (the "Equitas Premium") was individually calculated and charged to the particular Name. Names who wished to resign their membership in Lloyd's would be able to do so upon payment of their Equitas Premium and other outstanding obligations. Names who did not accept the Settlement Offer did not receive credits to offset their Equitas premiums. The non-settling Names, however, could continue to litigate with Lloyd's and others who did business in the Lloyd's market. If the Settlement Offer was not accepted, a Name was still required to pay the full amount of his underwriting obligations, including the Equitas Premium.

Lloyd's, in implementing the R&R plan, required each Name to become a party to the Equitas reinsurance contract through an appointed, substituted agent. This substituted agent signed the contract on behalf of the Name.

The Equitas policy contained two key provisions, both at issue in this case. First, the Equitas reinsurance contract contained a "pay now, sue later" clause that precluded Names from asserting claims they might have had against Lloyd's as a set-off or counterclaim. The Equitas reinsurance contract also contained a "conclusive evidence" clause which provided that, "in the absence of manifest error," Lloyd's determination of a Name's Equitas premium was conclusive.

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According to Lloyd's, less than five percent of all Names did not accept the Settlement Offer. A still smaller number, including the Defendants, refused to pay the Equitas Premium. The R&R plan became effective on September 3, 1996, and the Equitas Premium became due and payable on September 30, 1996. Equitas subsequently assigned the right to recover payment of the Equitas premium to Lloyd's.

Beginning in late 1996, Lloyd's brought separate actions in England against the Defendants and other Names who had not paid the Equitas Premium. In the English Actions, Lloyd's sought payment of each of the Defendants' respective Equitas Premiums plus unpaid interest and costs. The English Actions were commenced by filing a Writ of Summons in the English Court against each of the Defendants.

Lloyd's notified each of the Defendants of the commencement of the English Action against him or her by serving each Defendant through his or her agent, duly appointed to accept service, with a writ of summons. Each of the Defendants filed an Acknowledgment of Service of Writ of Summons through their solicitors of record, the firm of Epstein Grower and Michael Freeman. By filing the Acknowledgment, each Defendant appeared in the English Court and notified Lloyd's of his or her intent to contest the claim.

In lengthy hearings, the Names raised several defenses to entry of the judgments by the English Court. The defenses included the following, all of which were rejected: (1) that Lloyd's lacked the regulatory authority under the *Lloyd's Acts* 1871-1982 to mandate that all Names purchase reinsurance

coverage from Equitas; (2) that Names were entitled to rescind their membership of Lloyd's as a result of alleged fraud in the inducement of their membership of, or underwriting at, Lloyd's; (3) that Names were entitled to litigate claims of fraud in the inducement of their membership of, or underwriting at, Lloyd's as a defense or set-off to their obligation to pay the Equitas premium; and (4) that the Names were not bound by certain provisions of the Equitas reinsurance contract, namely the "pay now, sue later" clause and the "conclusive evidence" clause. *See Society of Lloyd's v. Dennis Hugh Fitzgerald Leighs and Others*, [1997] (Demery Aff., Ex. J); *Society of Lloyd's v. Wilkinson & Ors.* (Q.B. 1997) (Demery Aff., Ex. J); *Society of Lloyd's v. Lyon; v. Leighs; v. Wilkinson,* (C.A. 1997) (Demery Aff., Ex. J) (affirming rulings of lower court); *Society of Lloyd's v. Fraser & Ors.* (C.A. 1998) (Demery Aff., Ex. K).

The English Court entered judgments in favor of Lloyd's against the Names on March 11, 1998. (*See* Demery Aff. Exs. A-I.) A three judge panel of the United Kingdom Court of Appeal heard argument on the application for leave to appeal by Names from June 15-19, 1998. Leave to appeal was denied on July 31, 1998. *See Society of Lloyd's v. Fraser & Ors.* (C.A. 1998) (Demery Aff., Ex. K). All appeals from the entry of the Judgments have been exhausted.

The Defendants have not satisfied their judgment debts. On March 8, 2002, the Society of Lloyd's filed a Complaint in this court to enforce the English judgments against the Defendants.

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II. *Pending Motions*

The following substantive motions are pending before the court:

(1) Wallace Bennett's motion to declare a particular foreign writ to be subject to Utah substantive law and unenforceable;

(2) Lloyd's motion for summary judgment;

(3) Lloyd's motion to dismiss the counterclaim of Stephen and Kelly Harmsen;

(4) Mr. Bennett's motion for certification of state law questions;

(5) The Caldwell Defendants'[2] motion for certification; and

(6) The Caldwell Defendants' motion for discovery under Federal Rule of Civil Procedure 56(f).

Additionally, the following procedural motions are pending:

(7) Lloyd's motion to strike paragraph 6(g) of motion to declare a foreign writ unenforceable;

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2. The "Caldwell Defendants," who are represented by the same counsel, consist of Grant R. Caldwell, Calvin P. Gaddis, David L. Gillette, James R. Kruse, Edward W. Muir, and Kent B. Peterson.

(8) Lloyd's motion to strike affidavit of Wallace Bennett;

(9) The Caldwell Defendants' motion to strike declaration of Nicholas Demery;

(10) Lloyd's motion to strike portions of the affidavit of Stephen Harmsen; and

(11) Lloyd's motion to strike exhibits in support of the Caldwell Defendants' combined memorandum in opposition to motion for summary judgment and in support of motion in the alternative for discovery under Rule 56(f).

ANALYSIS

I. *Motions for Summary Judgment*

The Plaintiff moves for summary judgment. Defendant Wallace R. Bennett moves to declare a particular foreign country writ to be (1) subject to Utah substantive law and (2) unenforceable. Mr. Bennett's motion is, in essence, a motion for summary judgment and the court will treat it as such.

A. Legal Standard

Under Federal Rule of Civil Procedure 56, a court may enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The party moving for summary judgment bears the initial burden of demonstrating that there is an absence of evidence to support the non-moving party's case. *Celotex Corp.*, 477 U.S. at 323; *Adler*, 144 F.3d at 670-71. A movant "may make its prima facie demonstration simply by pointing out to the court a lack of evidence for the nonmovant on an essential element of the nonmovant's claim." *Adler*, 144 F.3d at 671. In applying this standard, the court views the factual record and must construe all facts and reasonable inferences therefrom in the light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1402 (10th Cir. 1997).

Once the moving party has carried its initial burden, Rule 56(e) requires the nonmovant to "go beyond the pleadings and 'set forth specific facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Adler*, 144 F.3d at 671 (quoting Fed. R. Civ. P. 56(e)). The specific and pertinent facts put forth by the nonmovant "must be identified by reference to an affidavit, a deposition transcript or a specific exhibit incorporated therein." *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992). Mere allegations and references to the pleadings will not suffice. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Appendix B

B. Discussion

1. Can the English Judgments be Enforced under Principles of Comity?

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 164 (1895).

The court's jurisdiction is based on diversity of citizenship. Utah law therefore applies concerning whether to enforce foreign judgments. *See Smith v. Toronto-Dominion Bank*, 166 F.3d 1222 (10th Cir. 1999), *available at* 1999 WL 38160, at **2 (applying Utah law when determining whether to recognize a Canadian judgment) (unpublished decision).

The Utah legislature, unlike many other states' legislatures, has not adopted the Uniform Foreign Money Judgments Recognition Act (the "Uniform Act"). *See Smith*, 1999 WL 38160, at **2. In *Mori v. Mori*, the Utah Supreme Court indicated that in Utah, "[a]bsent a treaty or statute, a foreign country judgment can be enforced only under principles of comity." 931 P.2d 854, 856 (Utah 1997) (citing

Hilton, 159 U.S. at 163-64). General principles of comity require a court to recognize a foreign judgment if

> there has been an opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment.

Smith, 1999 WL 38160, at **2 (quoting *Hilton*, 159 U.S. at 202). Determining whether to enforce another country's judgment is a matter of "judicial discretion." *Mori*, 931 P.2d at 856 (quoting *Pan Energy v. Martin*, 813 P.2d 1142, 1146 (Utah 1991)).

In an unreported decision, the Tenth Circuit has provided guidance regarding the proper analysis of comity under Utah law. *See Smith*, 1999 WL 38160, at **2. In *Smith*, a diversity action in which the Tenth Circuit applied Utah law, the court determined whether Utah courts would recognize a Canadian judgment. *Id.* at **2. No Utah court had yet "been called upon to recognize a Canadian Judgment." *Id.* The court, however, found it "reasonable to believe the Utah courts would [] recognize a Canadian judgment if that judgment satisfied the requirements outlined in *Hilton* and otherwise comported with Canadian law." *Id.* In making its finding,

the court relied upon "the Utah Supreme Court's statements in *Mori*, as well as the long history of other courts recognizing Canadian judgments under principles of comity." *Id.*

a. The English system of jurisprudence

In *Hilton*, the Supreme Court required that a foreign judgment sought to be enforced come from a country with "a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries." *Hilton*, 159 U.S. at 202. As stated by the Ninth Circuit in a decision recognizing an English judgment, "[i]t has long been the law that unless a foreign country's judgments are the result of outrageous departures from our own motions of 'civilized jurisprudence,' comity should not be refused." *British Midland Airways Ltd. v. Int'l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (citing *Hilton*, 159 U.S. at 205).

There is little argument that the English courts are part of a judicial system that has procedures compatible with American standards of due process and impartial tribunals. *See Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992) ("We have been shown nothing to suggest that an English court would not be fair, and in fact, our courts have long recognized that the courts of England are fair and neutral forums.") As stated by Judge Posner for the Seventh Circuit in an opinion upholding the lower court's decision to enforce judgments against American Names, "[a]ny suggestion that [the English] system of courts 'does not provide impartial requirements of due process of law' borders on the risible." *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 476 (7th Cir. 2000).

b. Opportunity for a full and fair trial

The Defendants contend that they were not given an opportunity for a full and fair trial. According to the Defendants,[3] they were denied due process in a number of ways. Specifically, they contend that (1) they were unlawfully bound to unlawful contracts because an appointed substitute agent signed the Equitas contracts, (2) they could not assert affirmative defenses in the English proceedings, and (3) they could not engage in discovery or present evidence to challenge the existence or amount of liability. These alleged deficiencies all stem from the "pay now, sue later" and "conclusive evidence" provisions in the Equitas contract and the fact that an appointed agent signed the contract for the Defendants.

As a threshold matter, in cases in which the particular proceedings that are being challenged by the Defendants here were at issue, both the Seventh and Fifth Circuits have found that English courts provided adequate due process. *See Ashenden*, 233 F.3d at 476-77; *Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 329-30 (5th Cir. 2002). These courts were deciding cases from jurisdictions which had passed the Uniform Foreign Money-Judgments Recognition Act. The courts' analyses, however, apply here, even though Utah has not adopted the Uniform Act.[4] In *Ashenden*, the court

3. Although the various Defendants filed separate memoranda and raised a number of independent arguments, the court will treat all Defendants and their arguments collectively, unless otherwise indicated.

4. Although not determinative, the court finds *Ashenden*, 233 F.3d at 482, and *Turner*, 303 F.3d at 329-30, to be persuasive. Like (Cont'd)

explained that the Uniform Act merely required that a foreign country's due process doctrines must be "compatible" with American doctrines. 233 F.3d at 477. This meant that foreign procedures must be "fundamentally fair" and not offend "basic fairness." *Id.* (quoting *Ingersoll Milling Machine Co. v. Granger*, 833 F.2d 680, 687-88 (7th Cir. 1987), and citing *Hilton*, 159 U.S. at 202-03). The court emphasized that "[h]ow much process is due depends on the circumstances." *Ashenden*, 233 F.3d at 479. The "pay now, sue later" clause "enable[d] Equitas to be fully funded immediately," which "would work to the benefit of the names by giving them surer, earlier, and fuller reinsurance." *Id.* The conclusive-evidence clause "extinguishe[d]" claims by the Names. *Id.* at 480. The Seventh Circuit found that these clauses did not constitute procedural due process offenses. *See id.* at 479-80. The court also found that the English court's holding that Lloyd's could appoint agents to bind the Names without the Names' permission was not impermissibly unreasonable. *See id.* at 480-81.

In *Turner*, as in *Ashenden*, the Defendants raised many of the same arguments raised by the Defendants here,

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(Cont'd)

the Uniform Act, the operative and often cited language in *Hilton*, the Supreme Court decision cited with approval by the Utah Supreme Court in *Mori*, 931 P.2d at 856, emphasizes the soundness of a foreign country's "system of jurisprudence" and "system of laws." *Compare Smith*, 1999 WL 38160, at *2 (quoting *Hilton*, 159 U.S. at 202), *with Ashenden*, 233 F.3d at 476 (emphasizing the Illinois Uniform Act's reference to a foreign country's "system" of courts). Additionally, the Seventh and Fifth Circuits in *Ashenden*, 233 F.3d at 478-80, and *Turner*, 303 F.3d at 331 n.22, respectively, analyzed the underlying facts and the foreign proceedings sought to be enforced.

including a claim that the "pay now, sue later" clause and the "conclusive evidence" clause violated due process. *See Turner*, 303 F.3d at 327-28; *see also Soc'y of Lloyd's v. Webb*, 156 F. Supp. 2d at 639 (N.D. Tex. 2001), *aff'd sub nom, Soc'y of Lloyd's v. Turner*, 303 F.3d at 333. The Fifth Circuit rejected their arguments, noting that "[Defendants] Webb and Turner [had] provided no evidence that the English court proceedings [] were unfair." *Turner*, 303 F.3d at 331 n.22.

It is also important to recognize that the English courts have considered and rejected the Defendants' claims. In *Society of Lloyd's v. Wilkinson & Others*, at 17, 21 (Q.B. 1997) (Demery Aff., Ex. J), the court considered and rejected the Names' challenge of the "pay now, sue later" clause. This decision left the Names free to pursue claims of fraud against Lloyd's in a separate proceeding.[5] *See id.* at 21 (stating that the clause could "[i]n no sense . . . be described as excluding or restricting the remedy by way of damages for fraudulent misrepresentation"). In *Society of Lloyd's v. Fraser & Others*, at 27 (C.A. 1998) (Demery Aff., Ex. K), the court rejected the Names' challenge of the "conclusive evidence" clause. The court found that the provision was "not an unusual type of clause and [was] in principle appropriate to [the] contract." *Id.* The court also stated that "[n]o issue ha[d] been raised which [was] sufficient to justify going behind the figures produced under [the "conclusive evidence" clause] nor have

5. Many Names did bring fraud claims against Lloyd's in a separate action in England. *See Society of Lloyd's v. Jaffray*, 2000 WL 1629463 (Q.B. Nov. 2, 2000), *aff'd*, 2002 WL 1654876 (C.A. July 26, 2002). The English courts determined that the Names had not met their burden of proving that Lloyd's alleged misrepresentations were made fraudulently.

the Applicants succeeded in making out a case of manifest error in those figures." *Id.* at 28. Finally, the court in *The Society of Lloyd's v. Dennis Hugh Fitzgerald Leighs and Others*, [1997], at 5-10, 31 (Demery Aff., Ex. J), considered and rejected the argument that the Names should not be bound by the Equitas contract.

In sum, Defendants were given a full and fair opportunity to litigate their claims in the English courts.

2. Public Policy Challenge

The Defendants claim that the English Judgments conflict with Utah public policy. Their arguments in support of this claim are basically the same as those supporting their due process claim. According to the Defendants, (1) the English Judgments violated public policy by binding the Utah Names to an unconscionable contract which was signed by an unauthorized agent; (2) the "pay now, sue later" provision in the Equitas contract violated public policy by not allowing the Names to raise affirmative defenses; and (3) the "conclusive evidence" clause violated public policy by preventing the Names from discovering or presenting evidence to refute the existence or amount of liability. In addition, Mr. Bennett contends that enforcing the Equitas contract would violate the anti-waiver provision of the Utah Uniform Securities Act.[6] *See* Utah Code Ann. § 61-1-22(9)

6. The effect of Utah Code Annotated section 61-1-22 in this case is one of the issues Mr. Bennett urges the court to certify to the Utah Supreme Court. (*See* Mem. Supp. Mot. for Certification of State Law Questions by Def. Wallace Bennett, at 10-12.)

(2000) (stating that "[a] condition, stipulation, or provision binding a person acquiring a security to waive compliance with this chapter or a rule or order hereunder is void").

The district court in *Webb* rejected arguments similar to the Defendants' here. *See Webb*, 256 F. Supp. 2d at 643-44. Although its analysis was based on the Texas Uniform Act, the analysis is helpful here. The court distinguished between the cause of action on which the judgment is based and the judgment itself. The court stated that if *the cause of action* on which the judgment is based is repugnant to public policy, a court could refuse to recognize it. *See id.* at 643; *see also Turner*, 303 F.3d at 332. But if the judgment itself offends public policy, that fact, in and of itself, is not grounds for a court to refuse to recognize it. *Webb*, 156 F. Supp. 2d at 643. Additionally, the court in *Webb* noted that to refuse to enforce a foreign country judgment on public policy grounds, "[t]he level of contravention would have to be high," such that the foreign law was "inimical to good morals, natural justice, or the general interests of the citizen [sic] of this state." *Id.* at 644 (quoting *Hunt v. BP Exploration Co.*, 492 F. Supp. 885, 899 (N.D. Tex. 1980), and *Gutierrez v. Collins*, 583 S.W.2d 312, 322 (Tex. 1979)); *see also Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 443 (3rd Cir. 1971); Restatement (Third) of Foreign Relations § 482 cmt. f (1987) (stating that "[c]ourts will not recognize or enforce foreign judgments based on claims perceived to be contrary to fundamental notions of decency and justice").

As in *Webb*, Lloyd's cause of action in this case—for breach of contract—is not repugnant to Utah public policy. *See Webb*, 156 F. Supp. 2d at 643-44; *see also Turner*, 303

F.3d at 332. Additionally, the Defendants' claims of conflicting public policy, which focus primarily on the "pay now, sue later" and "convincing evidence" provisions in the Equitas contract and the appointment of a substitute agent, do not rise to levels that would require the court to not enforce the foreign judgment. *See Webb*, 156 F. Supp. 2d at 644; *Turner*, 303 F.3d at 331-32.

Finally, when the Names signed Lloyd's General Undertaking, they agreed that English law, not Utah law, would govern disputes arising between them and Lloyd's. *See Webb*, 156 F. Supp. 2d at 643 (rejecting public policy arguments because the Fifth Circuit had upheld the choice of law and choice of forum clause). The Tenth Circuit has upheld the choice of law and choice of forum clauses contained in the General Undertaking. *See Riley*, 969 F.2d at 958; *see also Richards v. Lloyd's of London*, 135 F.3d 1289, 1294 (9th Cir. 1998) (following the court's "six sister circuits that have ruled to enforce the choice clauses"). Implicit in the Tenth Circuit's decision in *Riley* was an understanding that the resulting English Judgments could differ from decisions rendered in American courts. *See Riley*, 969 F.2d at 958 (stating that "[t]he fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement, provided that the law of the chosen forum is not inherently unfair").

Based on the above, the court concludes that the Defendants' arguments that enforcement of the Lloyd's judgments would violated Utah public policy are not persuasive.

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In addition, authority from both the Tenth Circuit and elsewhere also weighs against Mr. Bennett's claim that enforcing the English Judgments would conflict with Utah Code Annotated section 61-1-22. Section 61-1-22 provides that "[a] condition, stipulation, or provision binding a person acquiring a security to waive compliance with this chapter or a rule or order hereunder is void." Utah Code Ann. § 61-1-22(9). To date, no reported decision appears to have discussed the scope of this anti-waiver provision. It follows that no decision has discussed whether Lloyd's General Undertaking, which calls for the application of English law, and the Lloyd's Act of 1982, which immunizes Lloyd's from many American securities laws, violate the public policy expressed in section 61-1-22. *See Richards*, 135 F.3d at 1296 (discussing the Lloyd's Act of 1982). There is no reason to believe, however, that Utah law would deal with this question any differently than the Ninth and Tenth Circuits have in recent years. *See id.*; *Riley*, 969 F.2d at 959.

In *Richards*, the Ninth Circuit determined that Lloyd's choice of law and choice of forum clauses did not "contravene a strong public policy embodied in federal and state securities laws." 135 F.3d at 1294-95. In that case, the Names relied upon *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985), to "argue that federal and state securities laws are of 'fundamental importance to American democratic capitalism.'" *Richards*, 135 F.3d at 1295. Relying on what the Ninth Circuit referred to as "dictum in a footnote regarding antitrust law," *id.*, the Names "claim[ed] that enforcement of the choice clauses [would] deprive them of important remedies provided by our securities laws." *Id.* The court, however, emphasized that the

Supreme Court had recognized "that parties to an international securities transaction may choose law other than that of the United States, . . . yet [had] never suggested that this affected the validity of a forum selection clause." *Id.* (discussing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 508 (1974)).

The court in *Richards* recognized that "the Lloyd's Act immunizes Lloyd's from many actions possible under our securities laws." 135 F.3d at 1296. It explained, however, that "Lloyd's is not immune from the consequences of actions committed in bad faith, including fraud." *Id.*; *see also Riley*, 969 F.2d at 958 (stating that "English law does not preclude Riley from pursuing an action for fraud and we agree with the Defendants that the Lloyd's Act does not grant statutory immunity for such claims"). In part because such remedies were available, the court held that the anti-waiver provisions in the Securities Act of 1933 and the Securities Exchange Act of 1934 did not void the choice clauses in Lloyd's transaction with the Names. *See Richards*, 135 F.3d at 1296; *see also Riley*, 969 F.2d at 957 (giving effect to Lloyd's choice provisions and rejecting argument that the defendant was "being deprived of all substantive rights under the federal securities laws").

Mr. Bennett points outs that one California appellate court decision has declined to dismiss a claim against Lloyd's on the basis of the choice of forum and law clauses. (*See* Mem. Supp. Mot. to Declare Particular Foreign-Country Writ Unenforceable at 9); *West v. Lloyd's*, No. B095440, 1997 WL 1114662, at *8-9 (Cal. Ct. App. Oct. 23, 1997) (unpublished opinion). The court in *West* voided Lloyd's

choice clauses because the clauses "violat[ed] California's fundamental public policy against waivers of the protections afforded by its securities laws." *See* 1997 WL 1114662, at *1. This case, however, is not good law. The California appellate court in *West* relied on the Ninth Circuit's first opinion in *Richards v. Lloyd's*, 107 F.3d 1422 (9th Cir. 1997). *See West*, 1997 WL 1114662, at *6 n.8, *8 n.11. The first *Richards* decision was subsequently withdrawn by the Ninth Circuit sitting *en banc* in *Richards v. Lloyd's*, 135 F.3d at 1291.

As Lloyd's explains, in *Richards*, the plaintiffs specifically referenced state securities laws—including Utah's— in Appendix D to their Amended Complaint, and argued that these laws constituted a public policy against the choice of law and forum clauses. *See Richards*, 135 F.3d at 1295-96 (discussing the effect of federal and state securities laws on Lloyd's choice clauses). In this case, Mr. Bennett makes the same public policy argument that both the Ninth and Tenth Circuits rejected in *Richards* and *Riley*, respectively. *See Richards*, 135 F.3d at 1295-96; *Riley*, 969 F.2d at 957-58. The only apparent difference is that the provision Mr. Bennett relies upon, Utah Code Annotated section 61-1-22, has not been singled out and specifically discussed in either decision. Given the fact that the *Richards* and *Riley* decisions dealt with the same underlying transactions at issue here, Mr. Bennett's public policy argument should not defeat Lloyd's motion for summary judgment.

Based on the above, the court concludes that all the requirements set forth by the Court in *Hilton* have been met

and the Lloyd's judgments are entitled to recognition. Accordingly, Lloyd's Motion for Summary Judgment is GRANTED.

II. *Related Matters*

A. Lloyd's Motion to Dismiss the Harmsens' Counterclaim

The Harmsens' counterclaim alleges fraud in the inducement and negligent misrepresentation by Lloyd's. The Harmsens seek an accounting and a declaratory judgment. These claims concern the underlying transaction involving Lloyd's. Lloyd's argues that the forum selection and choice of law provisions signed by the Harmsens preclude litigation of their counterclaim in this court.

In opposition to Lloyd's motion to dismiss, the Harmsens make the following arguments: (1) the choice clauses should not apply here because Lloyd's availed itself in a United States court to enforce an English judgment; (2) Lloyd's is exempt from fraud claims in England, making any opportunity to bring such a claim in English courts illusory; and (3) the counterclaim is required as a mandatory counterclaim under Utah Rule of Civil Procedure 13(a). But the Harmsens provide no law in support of their arguments.

As discussed in detail above, the agreements between Lloyd's and each of the Defendants, including the Harmsens, contain forum selection and choice of law clauses that obligate the Defendants to litigate any claims they may have against Lloyd's in the courts of England under English law.

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Section 2.2 of the General Undertakings signed by Mr. and Mrs. Harmsen, respectively, states in part that the parties agreed "that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's." (*See* Demery Aff. Ex. E., Ex. F.) The Tenth Circuit in *Riley* found these provisions to be valid. *See* 969 F.2d at 958. In addition, at least seven other circuits have held these same clauses to be valid. *See Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285 (11th Cir. 1998); *Richards*, 135 F.3d at 1294; *Haynsorth v. The Corporation, a/k/a Lloyd's of London*, 121 F.3d 956 (5th Cir. 1997); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993). Because no reported case law indicates that the court should disregard the choice clauses merely because Lloyd's is a plaintiff in this enforcement action, the court GRANTS Lloyd's motion to dismiss the Harmsens' counterclaim.

B. Motions for Certification of State Law Questions

Mr. Bennett and the Caldwell Defendants move to certify state law questions. Under Utah Rule of Appellate Procedure 41, a United States court, either on a motion or *sua sponte*, may certify certain questions of Utah law to the Utah Supreme Court. Utah R. App. P. 41(b) (2002).

Certification of legal questions to the state court is appropriate only where there is doubt about the application

of state law in a federal case. *See Houston v. Hill*, 482 U.S. 451, 471 (1987). The Tenth Circuit has stated that "[c]ertification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law." *Copier v. Smith & Wesson Corp.*, 138 F.3d 833, 838 (10th Cir. 1998) (quoting *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988)). Instead, certification should be invoked only in "exceptional cases" because the federal courts must "decide questions of state law whenever necessary to the rendition of a judgment." *Copier*, 138 F.3d at 838 (quoting *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943)).

The questions that the Defendants seek to certify are as follows:

> *1. Does Utah Substantive Law Apply in a Jurisdictional Diversity of Citizenship Case Seeking Enforcement of an English Judgment?*

Mr. Bennett seeks to certify to the Utah Supreme Court the question of what substantive law applies in this enforcement action. As discussed in detail above, the Utah Supreme Court has stated that, absent a treaty or statute, "principles of comity" determine whether foreign country judgments are enforceable in Utah. *See Mori*, 931 P.2d at 856. *Mori* favorably cited *Hilton*, 159 U.S. at 163-64, one of the Supreme Court's seminal comity decisions. Further, the Tenth Circuit, applying Utah law, recently employed principles of comity with respect to the *res judicata* effect of a Canadian judgment. *See Smith*, 1999 WL 38160, at **2. This decision applied Utah law with respect to whether the

foreign judgments should be given effect, *id.*, but noted that "questions regarding the validity of a foreign judgment 'should be tested by the law of the jurisdiction where the judgment was rendered.'" *Id.* at **2, n.2 (quoting *Rocky Mountain Claim Staking v. Frandsen*, 884 P.2d 1299, 1300-01 (Utah Ct. App. 1994)). These decisions provide clear answers to Mr. Bennett's proposed question for certification.

2. *Would Enforcement of Lloyd's English Judgments Against the Utah Names Violate Article I, Section 11 of the Constitution of Utah (the "Open Courts Provision")?*

Defendants contend that the applicability of the Utah Constitution's open courts provision in the context of enforcing a foreign country judgment presents a question of first impression in Utah. They also claim that this question is potentially dispositive in this case and that certification is therefore necessary. Although Defendants are correct that this issue has not yet been considered by a Utah court, the court believes that certification is not appropriate.

The Utah Constitution's open courts provision is similar to its due process provisions. Article I, section 11 states that

> [a]ll courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any

> tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Const., art. I, § 11. In *Brown v. Wightman*, the Utah Supreme Court stated that Utah's open court's provision did not create new rights or remedies. 151 P. 366, 366-67 (1915). Instead, this provision "plac[ed] a limitation upon the Legislature to prevent that branch . . . from closing the doors of the courts against any person who has a legal right which is enforceable in accordance with some known remedy." *Id.* at 366-67; *see also Laney v. Fairview City*, No. 981729, 2002 WL 1822152, at *7-8 (Utah Aug. 9, 2002) (discussing *Brown*, 151 P. at 366-67); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 686 (Utah 1985) (declaring that a products liability statute of repose violated Article I, section 11 of the Utah Constitution).

This case does not involve a legislative limitation on the Names' ability to enforce their legal rights. As such, Article I, section 11 of the Utah Constitution is not relevant, much less potentially dispositive, in this case. *Cf. Berry*, 717 P.2d at 676 (discussing the open courts provision in the context of a legislative limitation on remedies). Additionally, the Defendants have not been barred from defending Lloyd's claims. Under *Mori*, the Defendants have been able to challenge the enforcement of the English Judgments under common law principles of comity. *See Mori*, 931 P.2d at 856.

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3. Would Enforcement of Lloyd's English Judgments Violate Article I, Section 7 of the Utah Constitution, Utah's Due Process Clause?

The court has considered Defendants' due process challenges in this decision. The same analysis applies to the due process clause contained in Article I, Section 7 of the Utah Constitution.

4. Would Enforcement of Lloyd's English Judgments Violate Article I, Section 27 of the Utah Constitution?

Mr. Bennett moves to certify the question of whether Article I, section 27, the "fundamental rights" section, precludes enforcement of the English Judgments. Section 27 of Article I of the Utah Constitution states that "[f]requent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." Utah Const., art. I, § 27.

As Lloyd's explains, its action is an ancillary proceeding to collect a money judgment. Mr. Bennett has not identified any fundamental rights or principles at issue, other than due process. This is not an appropriate basis for certification.

5. *Does Section 61-1-22(9) of the Utah Code Annotated Override the Forum Selection and Choice of Law Provisions in the General Undertaking?*

The court has dealt with this issue above. As discussed, no Utah case appears to have directly discussed whether section 61-1-22(9) of the Utah Code Annotated would void a choice of law or forum selection clause that precludes application of Utah securities laws. However, substantial case law from both the Tenth Circuit and elsewhere provide adequate guidance for the court on this question.

C. Motion for Discovery Under Federal Rule of Civil Procedure 56(f)

The Defendants move the court to grant the Utah Names the opportunity for discovery under Federal Rule of Civil Procedure 56(f). Under Federal Rule of Civil Procedure 56(f), a court may delay ruling on a motion for summary judgment or refuse summary judgment outright "where the non-moving party has not had the opportunity to discover information that is essential to his opposition." *Int'l Surplus Lines Ins. Co. v. Wyoming Coal Refining Sys., Inc.*, 52 F.3d 901, 905 (10th Cir. 1995); *see* Fed. R. Civ. P. 56(f). The party opposing a motion for summary judgment must provide affidavits indicating why that party cannot "present by affidavit facts essential to justify the party's opposition" to summary judgment. *Lewis v. City of Fort Collins*, 903 F.2d 752, 758 (10th Cir. 1990) (quoting Fed. R. Civ. P. 56(f)); *Int'l Surplus Lines Ins. Co.*, 52 F.3d at 905.

The Defendants seek three types of discovery. First, the Defendants seek discovery about the basis and amount of the alleged liability on which the English judgments were based. The Defendants "expect to show that the amounts were completely arbitrary and therefore in violation of due process and public policy." Second, the Defendants seek discovery related to Lloyd's appointment of a substitute agent as well as the facts and circumstances surrounding the formation and execution of the Equitas contract. Third, the Utah Names seek discovery concerning Lloyd's contractual intent in entering into the General Undertaking.

The discovery sought by the Defendants goes to the validity of the underlying Equitas contracts and the appointment of a substituted agent to sign those contracts. The discovery sought by the Defendants is not relevant in light of the limited scope of this enforcement action. The Defendants' motion for discovery under Rule 56(f) is DENIED.

D. Motions to Strike

The parties' have filed various motions to strike materials submitted to the court. Those motions are DENIED AS MOOT.

IT IS SO ORDERED.

Appendix B

DATED this 12 day of November, 2002

BY THE COURT

s/ Tena Campbell
TENA CAMPBELL
United States District Judge

Supreme Court, U.S.
FILED
JUL 20 2005
OFFICE OF THE CLERK

No. 04-1731

IN THE

Supreme Court of the United States

WALLACE R. BENNETT,

Petitioner,

v.

THE SOCIETY OF LLOYD'S,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did the Tenth Circuit correctly determine that there is complete diversity of citizenship between the plaintiff in the district court (respondent here), The Society of Lloyd's ("Lloyd's"), an English corporation, and the defendants in the district court [including petitioner here, Mr. Bennett ("Bennett")], who are all individual residents of the State of Utah?

Did the Tenth Circuit correctly determine that an assignment of claims against Bennett from one English corporation, Equitas Reinsurance Limited ("Equitas"), to another English corporation, Lloyd's, was not a collusive assignment under 28 U.S.C. § 1359, for purposes of creating diversity of citizenship subject matter jurisdiction in the district court?

Did the Tenth Circuit, in this diversity action, correctly interpret Utah law in determining that Lloyd's English Judgment against Bennett is enforceable under principles of comity?

PARTIES BELOW AND CORPORATE DISCLOSURE STATEMENT

In addition to Lloyd's and Bennett, the parties in the Tenth Circuit included the following defendants-appellants: Richard A. Reinhart, Grant R. Caldwell, David L. Gillette, James R. Kruse, Edward W. Muir, Kent B. Petersen, Calvin P. Gaddis,[1] Stephen M. Harmsen and Kelly C. Harmsen. Lloyd's has no parent corporation and there is no publicly held company owning 10% or more of its stock.

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[1] During the pendency of the appeals in the Tenth Circuit, Lloyd's reached a settlement with Mr. Gaddis resulting in the dismissal of his appeal.

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STATEMENT OF THE CASE

Lloyd's is an English corporation, created by the U.K. Parliament through the *Lloyd's Act* 1871:

> The Right Honorable George Joachim Goschen . . . , and all persons admitted as members of Lloyd's before or after the passing of this Act, **are hereby united into a Society and Corporation** for the purposes of this Act, and for those purposes **are hereby incorporated by the name of Lloyd's, and by that name shall be one body corporate**, with perpetual succession and a common seal, and with power to purchase, take, hold, and dispose, of lands and other property (**which incorporated body** is hereafter in this Act referred to as the Society.)

[Lloyd's Act 1871, § 3, entitled "**Incorporation of Lloyd's**" (emphasis added)] (Relevant excerpts of the *Lloyd's Act* 1871 are attached as Exhibit D to Doc. 247). *See also*, the *Lloyd's Act* 1982, Paragraph (1), attached as Exhibit 1 to Doc. 244; *See also*, Doc. 97].[2] Through Parliamentary Acts, the *Lloyd's*

[2] In addition to appealing from the Judgment against him based on the District Court's November 12, 2002 summary judgment Order ["Summary Judgment Order," Appendix ("App.") B to Bennett's Petition for a Writ of Certiorari ("Petition") here], Bennett also appealed from a post-judgment Order, which, among other things, rejected his arguments that the District Court lacked diversity of citizenship subject matter jurisdiction (App. A hereto). In that second appeal, the record consisted of the district court record, because Bennett was *pro se* and not required to file an appendix containing the excerpts of the record he relied on. *See 10th Cir. R.* 30.1. Citations herein to the district court record before the Tenth Circuit in that appeal are by "Doc." No. However in the main (Cont'd)

Acts 1871-1982, the United Kingdom Parliament authorized Lloyd's to regulate the English insurance market. Lloyd's is not an insurer and does not insure risks. Instead Lloyd's promulgates and enforces regulations under the *Lloyd's Acts*, and exercises disciplinary authority over those who conduct insurance business in the Lloyd's market. As an insurance regulator, one of Lloyd's primary objectives is to make sure that valid claims of policy holders are paid. [Declaration of Nicholas P. Demery dated June 7, 2002 ("Demery Dec."), Aple. Supp. App. 168-176, ¶¶ 2, 3]

Individual and corporate members of Lloyd's known as "Names" underwrite insurance. The U.K. *Insurance Companies Act 1982* permits Names to conduct insurance business only as long as they become and remain subject to Lloyd's regulatory jurisdiction (Demery Dec., ¶ 4).[3]

As a condition of becoming members of Lloyd's, and/or continuing to underwrite insurance, Names, including Bennett, entered into agreements governing their membership in Lloyd's and underwriting in the Lloyd's market. Among these

(Cont'd)

appeals related to the merits of the November 12, 2002 Summary Judgment Order, in which Bennett also participated and which were consolidated with Bennett's second appeal, the record before the Tenth Circuit primarily consisted of appendices filed by the defendants other than Bennett, and by Lloyd's. *See 10th Cir. R.* 30.1 and 30.2. These appendices are cited herein as the "Caldwell Def. App," the "Harmsen App" and "Aple. Supp. App." Also, in the district court, Bennett never disputed the facts set forth below (Aple. Supp. App 30-40 and 776-781), and therefore they are deemed admitted by him. *See D. U. Civ. R.* 56-1(c).

[3] This was the applicable statute at all relevant times. The presently applicable statute is the *Financial Services and Markets Act* 2000.

agreements is the General Undertaking. In the General Undertaking, Bennett agreed, in part, (1) that he would comply with the provisions of the *Lloyd's Acts* 1871-1982 and any byelaws or regulations Lloyd's promulgated thereunder, (2) that any dispute arising out of or relating to his membership of and underwriting insurance business at Lloyd's would be resolved in English Courts pursuant to English law, and (3) that an English Judgment would be conclusive, binding and enforceable in any other jurisdiction.[4] (Demery Dec., ¶¶ 5, 6; Caldwell Def. App. 26-37, clauses 1 through 2.3)

Names underwrite insurance by forming groups known as "syndicates." Names' liability is several rather than joint. Bennett incurred liabilities with respect to insurance commitments that he undertook by assuming a portion of a syndicate's risk in the Lloyd's market.[5] In order to close the syndicate at the end of each underwriting year of account, reinsurance is purchased to cover any outstanding liabilities as well as liabilities that have been incurred but not reported. (Demery Dec., ¶ 7)

Underwriting in the Lloyd's market was historically a profitable venture. However, in the late 1980s and early 1990s, Names in the Lloyd's market incurred substantial underwriting losses (over $12 billion). As a result of these losses, Names

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[4] Under the *Lloyd*'s Acts, Names could only participate in the Lloyd's market through an underwriting agent, which would contractually assume management responsibilities over Names' underwriting activities.

[5] Bennett and his co-defendants (the "Utah Names") are all highly educated, financially sophisticated professionals and business people. (Caldwell Def. App. 94, ¶¶ 3, 4; 98, ¶¶ 3, 4; 104, ¶¶ 3, 4; 109, ¶¶ 3, 4; 114, ¶¶ 3, 4; 118, ¶¶ 3, 4; Harmsen App. 51, 52, ¶¶ 2, 3) As Bennett indicates in his Petition here, he is a retired law professor.

underwriting in those years were unable to purchase affordable reinsurance for their outstanding liabilities, thus making those liabilities open-ended. Many Names defaulted on their underwriting obligations as they came due, putting policyholders at risk of non-payment. Simultaneously, a significant amount of litigation began to embroil the Lloyd's market. (Demery Dec. ¶ 8)

To address these issues, which threatened the viability of the Lloyd's market, Lloyd's devised the reconstruction and renewal ("R&R") plan. The R&R plan provided reinsurance otherwise unavailable to each Name with respect to his or her pre-1993 underwriting obligations, through a newly formed company, Equitas.[6] The R&R plan also provided an offer of settlement (the "Settlement Offer") to each Name with pre-1993 underwriting liabilities, to end litigation and assist the Names in meeting their underwriting obligations. (Demery Dec. ¶ 9)

The cost of reinsuring each Name's pre-1993 liabilities (the "Equitas Premium") was individually calculated and charged to the particular Name.[7] Names who wished to resign their membership in Lloyd's would be able to do so upon payment of their Equitas Premium and other outstanding obligations. Names who did not accept the Settlement Offer

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[6] Equitas is part of the Equitas Group of business entities that was created as part of the R&R plan. (Ex. B to Doc. 247, pp. 81-82; Ex. 8 to Doc. 244, pp. 81-82) All of the companies in the Equitas Group—including Equitas—are private limited companies *incorporated in England and resident in the United Kingdom for tax purposes.* (Ex. B to Doc. 247, p. 83; Ex. 8 to Doc. 244, p. 83)

[7] While the Bennett disputes the accuracy of these calculations, that issue goes to the merits of Lloyd's English Judgments, which, as shown below, could not be relitigated in the district court here.

did not receive certain credits that the settling Names received to offset their Equitas Premiums, but could continue to litigate with Lloyd's and others who did business in the Lloyd's market. If the Settlement Offer was not accepted, a Name was still required to pay the full amount of his or her underwriting obligations, including the Equitas Premium. (Demery Dec. ¶ 9)

In implementing the R&R plan, and pursuant to the Substitute Agent's Byelaw of 1983 passed pursuant to s.6 and Schedule 2, paragraph (18)(b) of the *Lloyd's Act* 1982 (Aple. Supp. App. 984) Lloyd's appointed a substitute agent and required each Name to become a party to the Equitas reinsurance contract through that substitute agent. This substitute agent signed the contract on behalf of the Name. (Demery Dec. ¶ 10)

The Equitas reinsurance contract contained a "pay now, sue later" clause that precluded Names from asserting claims they might have had against Lloyd's or others as a set-off or counterclaim to payment of their Equitas Premium. The Equitas reinsurance contract also contained a "conclusive evidence" clause which provided that, "in the absence of manifest error," Lloyd's determination of a Name's Equitas Premium was conclusive (Demery Dec. ¶ 10).[8]

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[8] English Courts have held that the R&R plan was within Lloyd's regulatory authority, including the mandatory requirement that Names purchase reinsurance from Equitas. (Demery Dec. ¶ 10) Also, the "pay now, sue later" and "conclusive evidence" provisions, and Lloyd's right to appoint a substitute agent, were not new. Similar provisions were included in agency agreements the Names (including Bennett) signed with their underwriting agents at Lloyd's. [Aple. Supp. App. 19-29, ¶¶ 9(a) and (b) and 13(b); Harmsens App. 16, ¶ 9(a) and (b); 18-19, ¶ 13(b); 29, ¶ 9(a) and (b); 31-32, ¶ 13(b); *see also*, Caldwell Def. App. 632, ¶ 10; 658, ¶ 7.1(d)]

The R&R plan became effective on September 3, 1996. Less than five percent of all Names did not accept the Settlement Offer (which had a deadline for acceptance of August 28, 1996, subsequently extended to September 11, 1996). A still smaller number refused to pay the Equitas Premium, which became due and payable on September 30, 1996. Even though Bennett did not accept the Settlement Offer, he was still required to pay his full underwriting obligation, including the Equitas Premium. He failed to make payment, and Equitas subsequently assigned the right to recover payment of the Equitas Premium to Lloyd's. (Demery Dec. ¶¶ 11, 12)

Beginning in late 1996, Lloyd's brought separate actions in England against Bennett and other Names who had not paid the Equitas Premium (the "English Actions"). In the English Actions, Lloyd's sought payment of each of the Names' respective Equitas Premiums plus unpaid interest and costs. The English Actions were commenced by filing a Writ of Summons (equivalent to a complaint in U.S. litigation) in the English Court (High Court of Justice, Queen's Bench Division) against Bennett and other Utah Names. (Demery Dec. ¶ 13)

Lloyd's served Bennett, through his agent for service of process, with a Writ of Summons. He filed an Acknowledgment of Service through his English solicitors of record, the firm of Epstein Grower and Michael Freeman, thereby appearing in the English Court and notifying Lloyd's of his intent to contest the claim and to be represented by those English solicitors. (Demery Dec. ¶ 14)

In 32 days of hearings before English trial and appellate courts, the Names raised several defenses to entry of judgments by the English Court. (Demery Dec. ¶ 17) The defenses included the following, all of which were rejected: (1) that Lloyd's lacked

the regulatory authority under the *Lloyd's Acts* 1871-1982 to mandate that all Names purchase reinsurance coverage from Equitas; (2) that Names were entitled to rescind their membership in Lloyd's as a result of alleged fraud in the inducement of their membership of, or underwriting at, Lloyd's; (3) that Names were entitled to litigate their claims of fraud in the inducement as a defense or set-off to their obligation to pay the Equitas Premium; and (4) that the Names were not bound by the "pay now, sue later" and the "conclusive evidence" clauses in the Equitas reinsurance contract.[9]

The English Court entered judgments in favor of Lloyd's against Bennett and the other Names on March 11, 1998. (Demery Dec., Ex. A-I, Aple. Supp. App. 224, 273, 320, 368, 415, 461, 509, 557, 605) A three judge panel of the United Kingdom Court of Appeal heard argument on the application for leave to appeal by Names from June 15-19, 1998. Leave to

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[9] *See Society of Lloyd's v. Leighs and Others* (High Court of Justice February 20, 1997) (Demery Dec., Ex. J, Aple. Supp. App. 622-680); *Society of Lloyd's v. Wilkinson & Others* (High Court of Justice April 23, 1997) (Demery Dec., Ex. J, Aple. Supp. App. 682-704); *Society of Lloyd's v. Lyon; v. Leighs; v. Wilkinson*, (C.A. July 31, 1997) (Demery Dec., Ex. J, Aple, Supp. App. 608-619) (affirming rulings of lower court); Society of Lloyd's v. Fraser & Others (C.A. July 31, 1998), denying leave to appeal from High Court of Justice decisions dated December 3, 1997 and January 22 and March 4, 1998 (Demery Dec., Ex. K, Caldwell Def. App. 38-68). The Names were allowed to litigate their fraud claims separately in *Society of Lloyd's v. Jaffray*, 2000 WL 1629463 (High Court of Justice November 2, 2000), *aff'd*, 2002 WL 1654876 (C.A. July 26, 2002) (Aple. Supp. App. 782-936). The Names lost the *Jaffray* case, in which Bennett and the other Utah Names decided not to participate. Also, notwithstanding the "conclusive evidence clause," Lloyd's was required to produce documentation showing how the Equitas Premiums were calculated (*Fraser, supra*, Caldwell Def. App. 64-65).

appeal was denied on July 31, 1998. *See, Society of Lloyd's v. Fraser & Others, supra* (Demery Dec., Ex. K, Caldwell Def. App. 38-68).[10] Thus, all appeals from the entry of the English Judgments were exhausted.[11]

Bennett and the other Utah Names had not satisfied their judgment debts, and on March 8, 2002, Lloyd's filed its Complaint in Utah federal district court to enforce its English Judgments against Bennett and the other Utah Names. (Aple. Supp. App. 1-18)

REASONS FOR DENYING THE PETITION

I. THE TENTH CIRCUIT CORRECTLY DETERMINED THAT THERE WAS COMPLETE DIVERSITY OF CITIZENSHIP BETWEEN LLOYD'S, AN ENGLISH CORPORATION, AND THE DEFENDANTS IN THE DISTRICT COURT, WHO ARE ALL INDIVIDUAL RESIDENTS OF THE STATE OF UTAH

A. Background

As the Tenth Circuit recognized below, the U.K. Parliament gave powers to Lloyd's to regulate the English insurance market.

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[10] As to certain of their arguments, the Names filed leave to appeal (the equivalent of a U.S. petition for writ of certiorari) with the Judicial Committee of the House of Lords (the equivalent of the U.S. Supreme Court), which was denied. *See Society of Lloyd's v. Turner*, 303 F.3d 325, 328 (5th Cir. 2002).

[11] The foregoing undisputed facts are also set forth in the Tenth Circuit decision below that is the subject of Bennett's Petition here. *See Society of Lloyd's v. Reinhart*, 402 F.3d 982 (10th Cir. 2005), App. A to Bennett Petition, pp. 5a-14a.

See, Society of Lloyd's v. Reinhart, supra, App. A to Bennett Petition here, p. 5a. Early in its existence, Lloyd's may have been considered a kind of unincorporated association. However, this status changed over one hundred years ago, when Parliament explicitly incorporated Lloyd's (Ex. D to Doc. 247, *Lloyd's Act* 1871, § 3, entitled "Incorporation of Lloyd's"). As the Tenth Circuit also recognized below, since 1871 Lloyd's has been a corporation organized and existing by Acts of Parliament. *See also,* Doc. 97, *Lloyd's Act* 1982, ¶ 1; *Reinhart, supra*, App. A to Bennett Petition here, p. 38a.

Also, as established above, Lloyd's is not an insurer and does not insure risks. The only insurers in the Lloyd's market are underwriting members of Lloyd's who are known as Names. Names underwrite insurance by forming groups known as "syndicates," and each Name incurs personal liability with respect to insurance commitments that he or she undertakes by assuming a portion of a syndicate's risk in the Lloyd's market. (Demery Dec., Doc. 30, ¶¶ 2, 4, 7; *Reinhart, supra*, App. A to Bennett Petition here, p. 5a; Summary Judgment Order, App. B to Bennett Petition here, pp. 46a, 47a) Thus, Lloyd's is a legal entity separate and distinct from the entities operating in the market it regulates, and from the members of the syndicates who underwrite insurance in that market.

B. As an English Corporation, Lloyd's is a Citizen of England.

Bennett's assertion that all the members of Lloyd's have the same citizenship as Lloyd's is wrong because Lloyd's is an English corporation. A U.S. corporation is a citizen of the state where it has been incorporated and of the state where it has its principal place of business. 28 U.S.C. § 1332(c)(1). As to foreign corporations, "[I]t has long been the rule that a corporation

incorporated in a foreign nation is a citizen of that nation for purposes of diversity jurisdiction." *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 543 n.12 (5th Cir. 1997); *see also, National S.S. Co. v. Tugman*, 106 U.S. 118 (1882).[12]

Bennett's argument that Lloyd's takes the citizenship of its members is incorrect on a number of fronts. Because Lloyd's is a corporation, it has a citizenship independent of the citizenship of its members. The quotation from Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* ("*Wright & Miller*"), Vol. 13B, § 3623, p. 592 (West 1984) at p. 16 of Bennett's Petition here, to the effect that the stockholders of a foreign country corporation are presumed to be citizens of that country, is taken out of context. The full quotation reads:

> Thus, a presumption exists that all the stockholders of a corporation chartered by a foreign country are citizens of that country, **and the corporation may sue or be sued in the federal courts as an alien.**

(Emphasis added to indicate the portion omitted by Bennett.)

Moreover, as the surrounding pages in *Wright & Miller* explain, the presumption that stockholders have the same citizenship as their corporation arose from the outmoded concern that a corporation, an artificial being, could not be a citizen within the meaning of the Constitution, and therefore could not sue in federal court. *Wright & Miller*, § 3623, pp. 587-597. At one point the Supreme Court held that because a corporation was not a citizen, it could only act as an association of its

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[12] Thus, the cases Bennett cites at p. ii of his Petition here, which deal with the citizenship of U.S. national banking associations, are irrelevant.

stockholders, and therefore the citizenship of its stockholders controlled for purposes of federal diversity jurisdiction. *Id.* at pp. 589-90, citing *Bank of the United States v. Deveaux*, 5 Cranch (9 U.S.) 61, 3 L. Ed.38 (1809). Later, the Supreme Court changed this reasoning—in part because plaintiffs were often unable to bring suit in federal court against corporations with shareholders from various states—and established the presumption that all of the stockholders of a corporation were citizens of the state of incorporation. *Id.*, at pp. 590-91, citing *Marshall v. Baltimore & Ohio Railroad Co.*, 16 How. (57 U.S.) 314, 14 L. Ed. 953 (1853).

As *Wright & Miller* makes clear, this presumption has been modified by 28 U.S.C. § 1332(c)(1), which states that for purposes of diversity of citizenship, a U.S. corporation is a citizen of 1) the state in which it has been incorporated and 2) the state where it has its principal place of business. *Id.* at p. 592. Section 1332(c)(1) does *not* state that a stockholder of a corporation has the same citizenship as that corporation; and it does *not* state that U.S. stockholders of a foreign corporation have the same citizenship as that corporation. The settled law is that "diversity jurisdiction is present in suits between citizens of a State and citizens or subjects of a foreign state." *Torres, supra*, 113 F.3d at 543.[13] As *Wright & Miller* goes on to explain, ". . . [T]he presumption that all the stockholders of a corporation are citizens of the state of incorporation was of doubtful accuracy in 1854 and . . . *is totally unwarranted today.*" *Wright & Miller* § 3623 at p. 602 (emphasis added).

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[13] 28 U.S.C. § 1332 (a)(2) provides that diversity of citizenship exists between "(2) citizens of a State and citizens or subjects of a foreign state".

Nicholas Demery's statement in his declaration that Lloyd's is "a Society and Corporation incorporated under the *Lloyd's Acts* 1871-1982 comprising all persons admitted as members of Lloyd's," (as quoted in Bennett's Petition here at p. 23) does not contradict Lloyd's position in the least. The fact that Lloyd's is comprised of its members is irrelevant for purposes of U.S. diversity jurisdiction. As Demery's statement correctly points out, Lloyd's is a corporation. Therefore, it takes the citizenship of the nation of its incorporation: England, not that of its members.

Also, Bennett is deliberately confusing Lloyd's with the underwriting syndicates. *Indiana Gas Co. v. Home Ins. Co.*, 141 F.3d 314 (7th Cir. 1998), discussed by Bennett at pp. 21-22 of his Petition here, involves syndicates and their insureds, not Lloyd's.[14] As the district court recognized in the Summary Judgment Order (App. B to Bennett's Petition here), the syndicates are not Lloyd's. This case does not involve any syndicates. It is a dispute between a corporation (Lloyd's) and an individual (Bennett) by which Lloyd's seeks to enforce an English judgment against the individual. The syndicates are irrelevant to this case, and any analysis of their citizenship is inapposite.

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[14] On page 17 of his Petition here, Bennett also cites *O'Connor's Federal Rules, Civil Trials 2003*, for the proposition that "[f]or Lloyd's of London, diversity is determined by the residence of each name." Lloyd's counsel is not familiar with O'Connor's Federal Rules, and—despite inquiries at local law libraries—has been unable to locate a copy of this source. However, O'Connor was referring to the syndicates, not Lloyd's itself. Bennett acknowledged as much in the district court on p. 15 of Doc. 244, in which he added a bracketed reference to the syndicates in the above quote: "for Lloyd's of London [***syndicates***], diversity is determined by the residence of each name." (Emphasis added)

As an English corporation, Lloyd's is a citizen of England. Because each of the Utah Names is a citizen of the State of Utah, diversity jurisdiction is proper. *See, Society of Lloyd's v. Bila*, Civil No. A-03-CA-9 (W.D.Tex. May 21, 2003) (App. B hereto), and *Society of Lloyd's v. Sommer*, Civil Action No. 02-RB-1959 (OES) (D. Colo. September 9, 2004) (App. C hereto), in which the courts held that there was diversity jurisdiction in cases—just like this one—where Lloyd's filed suit to enforce an English judgment against an American Name.

II. THE TENTH CIRCUIT CORRECTLY DETERMINED THAT AN ASSIGNMENT OF CLAIMS FROM ONE ENGLISH CORPORATION, EQUITAS, TO ANOTHER ENGLISH CORPORATION, LLOYD'S, WAS NOT A COLLUSIVE ASSIGNMENT FOR PURPOSES OF CREATING DIVERSITY OF CITIZENSHIP

A. The Assignment at Issue is Equitas' Assignment to Lloyd's of Equitas' Claim Against Bennett Based on Bennett's Failure to Pay the Equitas Premium.

Bennett's argument that the assignment from Equitas to Lloyd's voids diversity jurisdiction is based on a misunderstanding of the facts and the law. 28 U.S.C. § 1359 states that "a district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." The purpose of this statute is to prevent parties from manufacturing diversity jurisdiction through the assignment of a claim from a non-diverse party to a diverse party. *See Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 916 (10th Cir. 1993), *cert. den.*, 510 U.S. 1112 (1994). Here, the undisputed facts in the record demonstrate that the

assignment in question, from one English corporation, Equitas, to another English corporation, Lloyd's, was not collusive.

Equitas was created as part of Lloyd's R&R plan, and it provided otherwise unavailable reinsurance to each Name. The cost of this reinsurance was called the Equitas Premium. The R&R plan also provided a settlement offer to each Name, which would have provided financial assistance to the Name in paying the Equitas premium, in return for a release of litigation claims. Those Names that did not settle were still required to pay the full amount of their underwriting obligations, including the Equitas Premium. After the R&R plan had become effective, in September 1996 Equitas assigned to Lloyd's the Equitas right to recover payment of the Equitas Premium from the non-settling Names. *See, Reinhart, supra*, App. A to Bennett Petition here, p. 11a. Lloyd's then sued many of the non-settling names, obtained English Judgments, and, with respect to many of those judgments against American Names, sought enforcement in America. (Summary Judgment Order, App. B to Bennett's Petition here)

Thus, the underlying claim is *Equitas' claim* for the Equitas Premium; it is not a claim that was ever held by Bennett's underwriting agents,[15] or the syndicates in which he is a member. Accordingly, Bennett's apparent attempts in his Petition here, to argue that the syndicates are the real parties in interest, are incorrect and have no evidentiary basis in the record.[16]

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[15] Bennett's initial underwriting agent was William Edwards Coutts & Partners, Ltd., which Bennett refers to several times in his Petition here.

[16] Moreover, the syndicates are not legal entities and are managed by the participating Names' agent.

B. Because Equitas is Also an English Corporation, Its Assignment to Lloyd's Was Not Collusive.

The assignment from Equitas to Lloyd's cannot be collusive because Equitas, like Lloyd's, is an English corporation and diverse from the Utah Names. The law only prohibits improper or collusive assignments that create diversity jurisdiction. *Western Farm Credit Bank v. Hamukua Sugar Co., Inc.*, 841 F. Supp. 976, 981 (D. Hawaii 1994), *aff'd*, 87 F.3d 1326 (9th Cir. 1996). As Judge Posner has observed with respect to 28 U.S.C. § 1359, "the statute can have no application where the assignor could have sued in federal court as well as the assignee." *Steele v. Hartford Fire Ins. Co.*, 788 F.2d 441, 445 (7th Cir. 1986). Thus, if the assignor is already diverse from the party in question, then the assignment cannot *create* diversity jurisdiction; diversity jurisdiction already existed.

As the Tenth Circuit held below, the record demonstrates that Equitas is a citizen of England. Equitas is part of the Equitas Group, and "[a]ll the companies in the Equitas group are all private limited **companies incorporated in England** and resident in the United Kingdom for Tax purposes." [Ex. B to Doc. 247, pp. 81-83 (emphasis added); *Reinhart, supra*, App. A to Bennett's Petition here, p. 38a] There is no evidence in the record to suggest that Equitas is a citizen of any other nation or state, much less the State of Utah.

Equitas is diverse from Bennett and the other Utah Names and therefore, as a matter of law, the assignment of its claim to Lloyd's is not collusive. Lloyd's has established that there was no collusive assignment and diversity jurisdiction is proper.[17]

[17] Contrary to the implication in Bennett's Petition here at p. i, n.1, there is no conflict between the circuits regarding the diversity issues Bennett attempts to raise.

III. THE OTHER ISSUES THE PETITION RAISES ARE ISSUES OF UTAH LAW ONLY

Bennett ignores the standards governing this Court's grant of certiorari, as set forth in *Sup. Ct. R.* 10:

> **Rule 10.** *Considerations Governing Review on Certiorari*
>
> Review on a writ of certiorari is not a matter of right, but of *judicial discretion.* A petition for a writ of certiorari will be granted only for *compelling reasons.* The following, although neither controlling nor fully measuring the Court's discretion, indicate the *character of the reasons the Court considers*:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an *important federal question* in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an *important federal question* in a way that conflicts with relevant decisions of this Court.

> (c) a state court or a United States court of appeals has decided an *important question of federal law* that has not been, but should be settled by this Court, or has decided an *important federal question* in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

(Emphasis added.) Thus, this Court grants certiorari primarily to consider "important federal questions."

As to the issues other than diversity of citizenship, Bennett does not suggest why this Court should have any interest in reviewing a decision by the Tenth Circuit interpreting purely Utah law, particularly where, as discussed below, the Tenth Circuit's decision was based upon, and is consistent with, decisions of the Utah Supreme Court and Utah Court of Appeals (as well as all of the other various federal circuits that have considered the comity issues).[18]

---

[18] Also, Bennett does not identify any criteria under *Sup. Ct. R.* 10 that would justify granting certiorari as to the diversity of citizenship federal law issues discussed above.

IV. THE TENTH CIRCUIT CORRECTLY INTERPRETED UTAH LAW IN DETERMINING THAT LLOYD'S ENGLISH JUDGMENT AGAINST BENNETT IS ENFORCEABLE UNDER PRINCIPLES OF COMITY

In *Reinhart, supra*, App. A to Bennett's Petition here, the Tenth Circuit considered consolidated appeals by Bennett and the other Utah Names, as well as a consolidated appeal by Mr. Reinhart, a New Mexico Name. As to Mr. Reinhart, the Court held that Lloyd's English Judgment against him was enforceable under New Mexico's version of the *Uniform Foreign Money - Judgment Recognition Act* ("Uniform Act"), also adopted in many other states. (App. A to Bennett Petition, pp. 2a-4a, 16a-29a)

However, Utah has not adopted the Uniform Act. Therefore, the Tenth Circuit analyzed the enforceability of Lloyd's English Judgments against Bennett and the other Utah Names under Utah common law principles of comity. *See Reinhart, supra*, App. A to Bennett Petition, pp. 29a-33a. However, before addressing the Utah law of comity, the Court noted that Lloyd's English Judgments against American Names have been uniformly enforced in numerous federal courts[19] (applying state

[19] There is no split in the circuits. *See Society of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000); *Society of Lloyd's v. Turner, supra*; *Society of Lloyd's v. Mullin*, 96 Fed. Appx. 100 (3rd Cir. May 5, 2004); *Society of Lloyd's v. Davies*, 107 Fed. Appx. 887 (11th Cir. May 21, 2004); *Society of Lloyd's v. Blackwell*, 127 Fed. Appx. 961 (9th Cir. April 13, 2005); *Society of Lloyd's v. Shields*, 118 Fed. Appx. 12 (November 17, 2004) (applying common law); *Society of Lloyd's v. Borgers*, 127 Fed. Appx. 959 (9th Cir. April 13, 2005) (applying common law), all of which have enforced Lloyd's English Judgments at issue, against American Names.

law) and state courts across the country, typically on motions for summary judgment by Lloyd's under either the Uniform Act or common law principles of comity. *See* cases cited in App. A to Bennett Petition, p. 15a, n.3.[20]

With respect to the Utah common law of comity, the Tenth Circuit correctly held that in *Mori v. Mori*, 931 P.2d 854, 856 (Utah 1997), the Utah Supreme Court ruled that foreign country judgments are enforceable in Utah under common law principles of comity set forth in *Hilton v. Guyot*, 159 U.S. 113 (1895). *See, Reinhart, supra*, App. A to Bennett Petition, p. 30a.[21] *Reinhart* also held that under *Hilton*, foreign nation judgments

---

[20] *See also, Society of Lloyd's v. Collins*, Case No. 00-713-CA-22 (19th Cir. Ct., Indian River County, Florida, June 4, 2003), *aff'd*, Case No. 4D03-2674 (Fla. 4th Dist. Ct. App. May 19, 2004); *Society of Lloyd's v. Rosenberg*, No. 02-1195 (E.D. Pa. August 13, 2002); *Society of Lloyd's v. Byrens*, Civil No. 02CV449 (S.D. Cal. May 29, 2003); *Society of Lloyds v. Evnen*, No. 8:02CV 118 (D. Neb. April 28, 2003) (applying common law); *Society of Lloyd's v. Edelman*, 03 Civ. 4921 (WHP) (S.D.N.Y. March 21, 2005), available at 2005 WL 639412; *Society of Lloyd's v. Hudson*, 276 F. Supp. 2d 1110 (D. Nev. 2003) (applying common law); *Society of Lloyd's v. Fuerst*, Case No. 04-2964 (8th Cir. July 11, 2005), available at 2005 WL 1606011; *Society of Lloyd's v. Siemon-Netto*, Civil Action No. 03-1524 (JR) (D.D.C. 2004).

[21] Even though the Uniform Act does not apply directly in Utah, the Uniform Act is based on common law principles of comity under Hilton and its progeny. *See* Uniform Act, § 4, Comment, Vol. 13, Part II, *Uniform Laws Annotated* 43, 59 (West 2002); *Ashenden*, 233 F.3d at 476-477 (citing *Hilton*). Thus, decisions like *Ashenden* and *Turner*, enforcing Lloyd's English Judgments under the Uniform Act, are persuasive authority here.

are enforceable in the U.S. if the following requirements are met:

> (1) there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction,
>
> (2) conducting the trial upon regular proceedings, after due citation or voluntary appearance of defendant,
>
> (3) under a *system* of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries,
>
> (4) there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or
>
> (5) no other special reason exists indicating why the comity of this nation should not allow it full effect.

Reinhart, App. A to Bennett Petition, pp. 30a-31a, quoting *Hilton* at 159 U.S. 202 (emphasis added by *Reinhart*).

Reinhart then held that under Utah law, ". . . the validity of a foreign judgment 'should be tested by the law of the jurisdiction where the judgment was rendered.'" [App. A to Bennett Petition, p. 31a, citing *Rocky Mtn. Claim Staking v. Frandsen*, 884 P.2d 1299, 1300-1301 (Utah App. 1994), *cert. den.*, 899 P.2d 1231 (Utah 1995)]. Thus, the Tenth Circuit ruled that under Utah law foreign country judgments are entitled to

comity based on an analysis of the foreign judicial system, not the particulars of the individual judgment, and there is no question about the fairness of the English judicial system:

. . .

> We have no choice under Hilton and Rocky Mountain but to examine the entirety of the foreign judicial system, and not the particularity of individual judgments.
>
> . . .
>
> *Like all the other circuits that have examined the question*, we have already determined that the English judicial system is procedurally above reproach.
>
> . . .

(App. A to Bennett Petition, pp. 31a-32a, citing 1 *Restatement (Third) of Foreign Relations* § 482 cmt. b (1987) and *Ashenden, supra*, 233 F.3d at 478, emphasis added).

Notwithstanding the foregoing, *Reinhart* noted that the district court did analyze the English court cases (cited in the Statement of the Case, above) with respect to the challenges of Names like Bennett to their liability to Lloyd's (App. A to Bennett Petition, pp. 32a-33a). *Reinhart* concluded that in those cases Bennett and the other Utah Names ". . . were given a full and fair opportunity to litigate their claims before the English courts." (*Id.* at p. 33a).[22]

---

[22] In this regard, *Reinhart* further noted that there were ". . . thirty-two days of hearings before English trial and appellate courts . . ." (Cont'd)

Reinhart then went on to reject Bennett's claims under the anti-waiver provisions of the Utah Uniform Securities Act, *Utah Code Ann.* § 61-1-22(9), based on its decision in *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992), *cert. den.*, 506 U.S. 1021 (1992), and the Ninth Circuit decision in *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998), *cert. den.*, 525 U.S. 943 (1998), in which Bennett was a party (App. A to Bennett Petition, pp. 8a-10a, 38a-40a).[23]

What Bennett sought in the Tenth Circuit, and what Bennett's Petition here seeks, is the right to litigate Lloyd's underlying claims against him in Utah, applying Utah law. However, as he agreed in his General Undertaking with Lloyd's, those claims have already been litigated before English courts, applying English law. As shown above, under Utah law, and according to every federal circuit court decision that has considered the issues, Lloyd's English Judgments against U.S. Names are fully enforceable in U.S. Courts, without relitigating the merits of those Judgments.[24]

(Cont'd)

Id. at p. 4a. Also, after a 19 week trial in England in *Jaffray*, *supra*, the Names (not including Bennett and the other Utah Names, who elected not to participate) lost their fraud claims against Lloyd's (App. A to Bennett Petition, p. 13a). That decision was affirmed on appeal. *Id.*

[23] The dicta Bennett cites on this point from factually unrelated Supreme Court decisions, at pp. 11-12 of his Petition, does not apply here.

[24] The so-called accounting issues Bennett seeks to raise in his Petition either were litigated and lost in the English courts (Bennett Petition, p. 27; *Reinhart*, App. A to Bennett Petition, pp. 12a-13a), or are based not on claims Bennett has against Lloyd's, but on claims he has against managing agents of syndicates regulated by Lloyd's (Bennett Petition, pp. 3, 27). Again, Bennett confuses Lloyd's with the syndicates.

CONCLUSION

Based upon the foregoing, Bennett's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION FILED JUNE 10, 2004

INTHE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Case No. 2:02CV-0204TC

THE SOCIETY OF LLOYD'S

Plaintiff,

vs.

WALLACE R. BENNETT, GRANT R. CALDWELL, CALVIN P. GADDIS, DAVID L. GILLETTE, STEPHEN M. HARMSEN, KELLY C. HARMSEN, JAMES R. KRUSE, EDWARD W. MUIR, and KENT B. PETERSEN,

Defendants.

ORDER

On May 13, 2004, a hearing was held on all pending motions before the Court in this matter. In attendance were Michael N. Zundel and Thomas R. Barton, counsel for Plaintiff The Society of Lloyd's ("Lloyd's"); Franklin Bennett and David Bennett counsel for Defendant Wallace R. Bennett ("Bennett"), who was also present; and Steven A. Wuthrich, counsel for Defendants Stephen M. Harmsen and Kelly C. Harmsen. Based on the papers filed by the parties, the argument presented at the hearing, additional materials as noted below, and good cause appearing therefor,

Appendix A

THE COURT ENTERS THE FOLLOWING ORDERS as to each of the following motions:

1. *Bennett's Amended Motion Challenging Diversity of Citizenship Jurisdiction of the Court, dated March 4, 2004* and *Bennett's Motion to Determine that the Absence of Diversity of Citizenship Jurisdiction Warrants Dismissal of this Case, dated March 19, 2004.* These motions are both denied for the reasons set forth in Lloyd's opposing memoranda. Specifically, the Court finds that Lloyd's is an English corporation. Therefore, as a matter of law, Lloyd's is a citizen of England. None of the defendants in this matter are citizens of England. Therefore, diversity jurisdiction is proper pursuant to 28 U.S.C. § 1332(a)(2). Furthermore, the Court finds that Equitas Reinsurance, Limited ("Equitas"), which is the assignor of Lloyd's underlying claims against the defendants, is also a citizen of England. Therefore, with reference to 28 U.S.C. § 1359, the assignment from Equitas to Lloyd's is not collusive and does not invalidate the diversity jurisdiction of this Court. The Court also finds that Lloyd's action against Bennett is not a "direct action against [an] insurer," and that therefore the diversity jurisdiction of this Court is not invalidated pursuant to the exception identified in 28 U.S.C. § 1332(c)(1).

2. *Lloyd's Motion to Strike Certain Exhibits to Bennett's Memorandum in Support of Amended Motion Challenging Diversity Jurisdiction of the Court, dated March 19, 2004.* This motion is denied as being moot.

3. *Bennett's Motion to Set Aside the Final Judgment Under Rule 60(b), dated March 19, 2004.* This motion is

denied. The Court finds that Bennett has not met his burden of demonstrating, by clear and convincing evidence, that Lloyd's has committed any fraud or misrepresentation that would warrant setting aside the Judgment Against Defendant Bennett.

4. *Bennett's Motion for Protective Order, dated May 10, 2004.* This motion is denied. The Court notes that it has previously denied Bennett's motion for stay pending appeal and for relief from posting supersedeas bond, and that Bennett has not posted a supersedeas bond. Under the circumstances, the grounds set forth by Bennett in his motion are insufficient to warrant an order restraining Lloyd's current collective efforts.

5. *Lloyd's Motion to Hold Defendant Wallace R. Bennett in Civil Contempt, dated January 26, 2004* ("Motion for Civil Contempt"). This motion is granted in part and denied in part for the reasons set forth below. Pursuant to 28 U.S.C. § 636(e)(6), Magistrate Judge Nuffer entered an Order Certifying Facts of Contempt, dated March 23, 2004. This order was based on Bennett's refusal to comply with Magistrate Judge Nuffer's Order Granting Motion to Compel, dated December 18, 2004, which Bennett admitted during the hearing before Magistrate Judge Nuffer on February 24, 2004. However, based on the representations of Bennett's counsel at the May 13, 2004, hearing, the Court understands that Mr. Bennett is now willing to comply with the Order Granting Motion to Compel. Therefore, the Motion for Civil Contempt, to the extent that it sought to incarcerate Bennett until he complied with the Order Granting Motion to Compel, is denied without prejudice, subject to Mr. Bennett's full

compliance with this Order. However, the Court finds that Bennett's conduct, up until the May 13, 2004 hearing, was in violation of theOrder Granting Motion to Compel. Therefore, to the extent that the Motion for Civil Contempt sought a recovery of reasonable attorneys' fees, the motion is granted.

IT IS HEREBY ORDERED that Lloyd's file and serve an affidavit of expenses, including reasonable attorneys' fees, incurred in conjunction with the Motion for Civil Contempt, within ten days of the entry of this Order. Bennett shall have ten days after the service of the affidavit to submit a response thereto.

IT IS FURTHER ORDERED THAT Bennett shall fully and completely respond to all outstanding written discovery, and deliver copies of responsive documents to Lloyd's counsel's offices, no later than Friday, June 18, 2004. No later than May 21, 2004, Bennett shall also provide Lloyd's counsel, in writing, five business days on which he will be available for deposition between June 28 and July 9, 2004. Lloyd's shall select the day (or days) on which the deposition shall occur. The aforementioned deadlines will not be affected by motions or requests made in the interim, and will not be altered except by order of the Court entered prior to the applicable deadlines. If Bennett fails to adhere to any of the aforementioned requirements, Lloyd's is directed to contact the Court immediately.

DATED this 9th day of June, 2004.

Appendix A

BY THE COURT:

s/ Tena Campbell
Tena Campbell
U.S. DISTRICT COURT JUDGE

APPROVED AS TO FORM:

_____

Attorney for Wallace D. Bennett

Mr. Bennett has objected to this proposed order. His objections are without merit and are hereby rejected.

Tena Campbell
6-9-04

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION FILED MAY 21, 2003

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. A-03-CA-9 JN

THE SOCIETY OF LLOYD'S

v.

CHARLES WILLIS BILA

ORDER

Before the Court are Defendant's Motion to Deny Recognition of Foreign Judgment (Clerk's Doc. No. 8), Defendant's 12(b)(1) Motion to Dismiss Notice of Filing of Foreign Country Judgment, and, in the Alternative, Request for Leave to Conduct Jurisdictional Discovery (Clerk's Doc. No. 9), Plaintiff's Opposition to Defendant's 12(b)(1) Motion to Dismiss Notice of Filing of Foreign Country Judgment (Clerk's Doc. No. 10), and Plaintiff's Motion for Recognition of Foreign Judgment and Opposition to Defendant's Motion to Deny Recognition of Foreign Judgment (Clerk's Doc. No. 11). Having considered the pleadings, case file, and applicable law, the Court enters the following Order.

Defendant contends that the Court lacks subject-matter jurisdiction in the instant case because Plaintiff and Defendant are not diverse parties. The Court disagrees.

Appendix B

Defendant is a Texas resident. Plaintiff is an English corporation. *Society of Lloyd's v. Turner*, 303 F.3d 325, 326-27 (5th Cir. 2002); *Society of Lloyd's v. Ashenden*, 233 F.3d 473, 475 (7th Cir. 2000). As Plaintiff is not incorporated in Texas and does not have its principal place of business in Texas, the parties are diverse, and, accordingly, the Court has subject-matter jurisdiction in this case. *See Howery v. Allstate Ins. Co.*, 243 F.3d 912, 920 (5th Cir. 2001).

Defendant's substantive arguments relating to theMotion to Deny Recognition of Foreign Judgment are that the judgment is repugnant to Texas public policy and was obtained in violation of due process of law.[1] The Fifth Circuit Court of Appeals has expressly rejected both arguments on these identical facts. *Turner*, 303 F.3d at 330-33. Needless to say, this Court will as well.[2]

---

1. Defendant also makes the related argument that the Names, a group to which Defendant belongs, were not allowed to assert the defense of fraud in the English proceedings, and, as such, the judgment should not be recognized. This argument can only be understood as a subset of the due-process argument in which Defendant is attempting to object in the collection phase of the case to the procedures used in the merits phase; this argument has been squarely rejected. *See Ashenden*, 233 F.3d at 477-78.

2. The Court would entertain a motion from Plaintiff for attorneys' fees and/or sanctions under FED. R.CIV. P. 11. At first blush, it appears that the only way the arguments presented by Defendant could pass muster under Rule 11 is if Defendant plans to pursue them all the way to the United States Supreme Court (assuming a request for an *en banc* hearing by the Fifth Circuit is either denied or the *en banc* hearing produces the same result as *Turner*). Anything

(Cont'd)

Appendix B

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendant's Motions (Clerk's Doc. Nos. 8 & 9) are hereby DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Recognition of Foreign Judgment (Clerk's Doc. No. 11) is hereby GRANTED.

SIGNED AND ENTERED this 21st day of May, 2003.

s/ James R. Nowlin
JAMES R. NOWLIN
CHIEF UNITED STATES DISTRICT JUDGE

(Cont'd)

less than this almost surely falls short of the strictures of FED. R. CIV. P. 11(b)(2). Assuming this is what Defendant has planned, it would weigh heavily in Defendant's favor in the Court's assessment of the merits of any motion for fees or sanctions by Plaintiff if Defendant represents this to the Court *and* follows through on those representations. If not, Defendant had better produce some novel, compelling arguments as to why he does not deserve to be sanctioned.

APPENDIX C — ORDER GRANTING MOTION FOR RECONSIDERATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED SEPTEMBER 9, 2004

Civil Action No. 02-RB-1959 (OES)

[Consolidated with Civil Action Nos. 02-RB-1960, 02-RB-1961, 02-RB-1962, 02-RB-1963, 02-RB-1979]

THE SOCIETY OF LLOYD'S,

Plaintiff,

v.

JOHN MEACHEM SOMMER,

Defendant.

ORDER GRANTING MOTION FOR RECONSIDERATION

Blackburn, J.

Pending is plaintiff's motion for reconsideration of the court's *sua sponte* dismissal of the above-captioned action for failure to satisfy the elements of diversity jurisdiction as pled in the case. In its dismissal order, the court found that the "names" who comprise plaintiff Society of Lloyd's (Lloyd's) "syndicates" are Colorado residents, thereby defeating diversity of citizenship between plaintiff and defendant, a Colorado resident. The dismissal order is premised upon a line of cases represented by ***Indiana Gas***

Appendix C

***Co. v. Home Insurance Co.*, 141 F.3d 314 (7th Cir. 1998)**, which, similar to this court's ruling, found an absence of diversity between defendants and plaintiff members of Lloyd's syndicates of the same state. Plaintiff's motion prompted additional research by the court, which led to the court's perusal of a later Seventh Circuit opinion, ***Society of Lloyd's v. Estate of McMurray*, 274 F.3d 1133 (7th Cir. 2001).**

In ***Estate of McMurray*** the court distinguishes a case such as ***Indiana Gas Co.***, where Lloyd's syndicates are a party plaintiff and are treated as partnerships for purposes of the diversity analysis, from cases such as this one, where it is Society of Lloyd's itself, a corporation incorporated under the laws of Great Britain, that is a party plaintiff. ***Estate of McMurray*, 274 F.3d at 1134 n.1.** Where a "name," or member, of a plaintiff Lloyd's syndicate shares citizenship with a defendant party, diversity is not present.[1] Where, however, Society of Lloyd's is a plaintiff in an action against a citizen of the United States, diversity of citizenship is present and federal jurisdiction is appropriate. The above-captioned matter is an ***Estate of McMurray*** type of case and not an ***Indiana Gas Co.*** type of case.[2]

---

1. An instructive analysis of Lloyd's unique organizational structure in the context of a federal diversity jurisdiction determination is found in ***Lowsley-Williams v. North River Insurance Company*, 884 F. Supp. 166 (D.N.J. 1995).**

2. *See also* ***Society of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002)**, and ***Society of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000)**, where federal courts exercised diversity jurisdiction in cases involving Lloyd's as a party plaintiff, although jurisdiction was not challenged by the defendants or addressed by the courts.

Appendix C

THEREFORE IT IS ORDERED as follows:

1. That **Plaintiff's motion for Reconsideration [#47]** filed July 24, 2003, is **GRANTED;**

2. That my **Order Dismissing Plaintiff's Complaint and Defendant's Counterclaims for Lack of Jurisdiction [#45]** filed June 19, 2003, is **RESCINDED;** and

3. That **Plaintiff's Unopposed Motion To Permit Withdrawl Of Motion For Reconsideration And Entry Of Judgment** filed September 8, 2004, is **DENIED AS MOOT.**

Dated September 9, 2004, at Denver, Colorado.

BY THE COURT:

s/ Robert E. Blackburn
Robert E. Blackburn
United States District Judge

Supreme Court, U.S.
FILED
JUL 29 2005
OFFICE OF THE CLERK

(3)

No. 04-1731

IN THE

Supreme Court of the United States

WALLACE R. BENNETT,

Petitioner,

v.

THE SOCIETY OF LLOYDS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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I. JURISDICTIONAL REQUISITES NOT MET

To sue under 28 U.S.C. § 1332, Congress has determined that there must be "complete diversity of citizenship." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978). Complete diversity must be manifest "as a threshold matter". *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998). "Standing to sue is part of . . . what it takes to make a justiciable case." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

In the case at bar, Wallace Bennett signed a seminal Agency Agreement having extensively detailed rights and duties with Edward Williams Coutts & Partners, Ltd., an unincorporated British insurance agency. [*See* Bennett Petition for Certiorari, pp. 13-15] Thereafter Lloyds of London caused a sequence of unilateral "assignments" whereby Coutts was wholly displaced by "Substituted agent" Castle Agency; followed by "AUA9"; then by "Equitas"; then to the "Society of Lloyds", the designated unincorporated-society-and-also corporation plaintiff herein. [Docs. 32, 178; Doc. 244, pp. 114-119].

Wallace Bennett became a **constituent Member** of "The Society" (#24021C) and a "Name" in Lloyds "community". [Compare this factually with Lloyds assertion that there exists "complete diversity" between "The Society and Bennett".]

Under the applicable law set forth in **II.** below, requisite § 1332 complete diversity is not clearly met; the Society should not be regarded as having unquestioned standing to sue through these assignments and as if it were a typical corporation; the case should be dismissed for failure of fundamental jurisdiction.

II. Determinative Facts and Law

Section 1332(a)(2), 28 U.S. Code specifically requires foreign plaintiffs to be "citizens or subjects of a foreign state. . . ." "The Society of Lloyds", designated collection agent for a consortium, is not itself comprised, even primarily, of "subjects of a foreign state". This failure should have been revealed by a non-U.S. government corporate disclosure statement required of Lloyds by Supreme Court Rule 30.6.

For diversity determinations, American case law deems an unincorporated association to be "a citizen of every state in which its members reside". [Hence requisite § 1332 diversity is not present.] *Hummel v. Townsend*, 883 F.2d 367, 369 (5th Cir. 1989). *Carden v. Arkoma Associates*, 494 U.S. 185 (1989).

The Seventh Circuit Court in *Indiana Gas Company, Inc. v. Home Insurance Company*, 141 F.3d 314, 316 (1998) held that complete diversity was lacking in that Lloyds case and dismissed the litigation pronouncing this policy:

> This approach reflects a strong reluctance to extend the diversity jurisdiction by judicial interpretation – a reluctance that has characterized the Supreme Court's jurisprudence ever since *Strawbridge* held that complete diversity is essential.

Id. at 319. [Quoted therein was *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934):

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction; but also that of the lower courts in a cause under review", even though the parties are prepared to concede it.]

Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 827-829 (1969) indicated factors that exclude jurisdiction recognition of successive assignments, especially among entities as to which truly independent status and consideration are questionable:

> . . . there can be little doubt that the assignment was for purposes of collection. . . . ". . . motivated . . . to make diversity jurisdiction available. . . ."
>
> If federal jurisdiction could be created by assignments of this kind, . . . a vast quantity of ordinary contract and tort litigation could be channeled into the federal courts at the will of one of the parties. Such "manufacture of Federal jurisdiction" was the very thing which Congress intended to prevent when it enacted § 1359 and its predecessors.

To this effect also see *Dweck v. Japan CBM Corporation*, 877 F.2d 790, 792-793 (9th Cir. 1989).

Prudential Oil Corp. v. Phillips Petroleum Co., 546 F.2d 469, 475 (2nd Cir. 1976) concluded:

> . . . it was suggested by the Supreme Court almost a century ago that an intercorporate assignment between a parent and its subsidiary should be treated as presumptively ineffective for jurisdictional purposes."

An evident absence of consideration especially taints the substantive *bona fides* of Lloyds' "assignments" herein. *See* 14 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3639, at p. 109 (2d ed. 1985).

III. The Deeper problem of Enforceability In Utah of This Foreign-Nation [English] Judgment

Although this particular 28 U.S.C. § 1332 case should be dismissed outright for lack of a clear showing by Lloyds of standing to sue and complete diversity jurisdiction, the history of this important international litigation provides a timely context for the High Court to deal with entwined federal – state relationships.

Two principal vectors impinge: a concern to pay special deference to agreed English contract clauses, processes and adjudications / opposed to a Congressional mandate that except in "federal – question" cases [28 U.S.C. § 1331], the law and equity of the involved forum *state* "shall be **regarded** as rules of decision."

The *ratio decidendi* of the Tenth Circuit opinion at bar seems: "We have already determined that the English judicial system is procedurally above reproach" [Op. p. 38]; and that "We have no choice under *Hilton* [c.f. analysis in Bennett Petition for Cert. p. 10] . . . "but to examine the entirety of the foreign judicial **system**, and not the particularity of individual judgments." [Op. p. 32]

The Tenth Circuit did qualify the conviction of its overall endorsement: "English courts found Lloyds guilty of negligence with respect to their Names" [Op. p. 10] and "Lloyds had been guilty of serious negligence and/or fraud" [Op. p. 8].

Clauses that prospectively disenable parties from pursuing statutory remedies in international cases have been questioned by the Supreme Court: *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) at p. 637, n. 19, ¶ 2 quoted in *Vimar Seguros Y Reaseguros, S. A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). The Supreme Court stated:

> . . . 1 Restatement (Third) of Foreign Relations Law of the United States § 482(2)(d) (1986) ("A court in the United States need not recognize a judgment of the court of a foreign state if . . . the judgment itself is repugnant to the public policy of the United States"). Were there no subsequent opportunity for review and **were we persuaded that "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy."**

Vimar Seguros, at p. 540, ¶ 2. [Emphasis added.]

Under The Rules of Decision Act, 28 U.S.C. § 1652, state law – not federal, not foreign – should govern the resolution of the legal and equitable claims and defenses of true divergent parties in a § 1332 action. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); and *Wainwright v. Goode*, 464 U.S. 78 (1983): "The views of the State's highest court with respect to state law are binding on the federal courts." *Id.* at p. 84, ¶ 2; "the petition for certiorari is granted, the judgment of the Court of Appeals . . . is reversed. . . ." *Id.* at p. 87, ¶ 3.

The late eminent constitutional authority Charles Alan Wright put it this way:

> The federal court must keep in mind . . . that its function is . . . to choose the rule it believes the state court, from all that is known about its methods in reaching decisions, is likely in the future to adopt.

Wright, LAW OF FEDERAL COURTS (5th ed. 1994) at p. 397.

Current Utah Supreme Court Chief Justice Christine M. Durham presciently emphasized in an article published in 1989 that a State may afford greater protections than under similarly worded federal statutes. *See* Bennett Petition for Certiorari, p. 28.

The Tenth Circuit Court did not understandingly apply this fundamental tenet of federal – state jurisprudence, and ignored what should have been controlling state law.[1] The Supreme Court declared in *United States v. Rutherford*, 442 U.S. 554, 555 (1979):

> Under our constitutional framework, federal courts do not sit as councils of revision empowered to rewrite Legislation in accord with their own conceptions of prudent public policy.

Whatever some federal court somewhere might determine, for example, about waiverability of federal securities act protections, the Utah Uniform Securities Act is unmistakable: there can be no waiver of compliance with its investor protections [UTAH CODE ANN. § 61-1-22(9)], and no suit can be brought in Utah on any investment contract that is in violation of the statute [UTAH CODE ANN. § 61-1-22(8)]. Other outcome-altering statutes, UTAH CODE ANN. 78-22b-107(3) and 78-22b-114, should also have been looked at relative to ordering enforcement executions in this state. The questions were not certified to the Utah Supreme Court, although motions for such were made.

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[1] "A federal court sitting in diversity applies the choice of law rules of the state in which it sits." *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). *Erie* established that there was to be no general "federal common law." Even Congress has no power to declare substantive rules of common law applicable in a state; and only Congress can determine lower federal court subject-matter jurisdiction. [As with many other states, Utah has not adopted the *Uniform Foreign - Money Judgments Recognition Act*. (10th Cir. Op. p. 31)]

IV. This Lloyds Case in Overview

The course of this tortuous lawsuit has flowed from solicitations of a prospective Utah investor by visiting British insurance representatives in 1978 to adjudications "irrevocably and unconditionally" submitted to the English Courts. A "Name", trusting the "entire good faith" of Lloyds of London, later agreed in 1986 in an unnegotiated, convoluted Agency Agreement having lurking consequences that he would make "no off-set, counterclaim or other deduction on any account whatsoever"; that he "would accede to all agreements required by the Council"; and that he would be bound by Lloyds Acts, not then disclosed.

The Lloyds Act of 1982 *exempted*:

> the Society from liability in damages at the suit of a member of the Lloyd's community. . . . Whether for negligence or other tort, breach of duty or otherwise, in respect of any exercise of omission to exercise any power, duty or functions conferred by Lloyd's Act 1871 to 1982.

Lloyds pattern of deceptively calculated agreements received scholarly analyses particularly by Professor of International Law Emeritus Courtland H. Peterson, 60 LA. L. Rev. 1259 (2000) and Darrell Hall, 97 Colum. L. Rev. 57 (1997). Professor Peterson faulted a due process breakdown in justice for American Names to a "me-too-ism" [*Ibid.* at 1274 -1275] by federal circuit courts in allowing enforcement of unconscionable and statutorily violative clauses in deference to the English system. The learned professor made profound penetration into cases such as *Ashenden*, 233 F.3d 473 (7th Cir. 2000) and their implications.

Contrary to the *Erie* doctrine, circuit court cases created a verboten variant of federal common law, and implicitly ignored the supremacy of state law. The cases mock historic Anglo-American jurisprudence regarding the fiduciary duties of agents to a principal, and current ethics in international business transactions.[2] Professor Peterson recommended that:

> An important first step in setting the record straight would be an outright reversal of *Ashenden*. . . .

60 LA. L. REV. 1259, p. 1279 ¶ 2.

Not based upon a treaty or applicable national statute, the Tenth Circuit Court followed an erroneous "federal common law" trend that allowed a foreign-country judgment (England) to be enforced in a state (Utah) without perceptive regard for predicate threshold jurisdictional limitations (§ 1332) or the transcendent federalism principle mandated by the U.S. Rules of Decision Act.

Respectfully submitted,

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[2] An intriguing footnote is that the same Judge Posner who wrote *Ashenden* and the often repeated notion that it would be "risible" to suggest the English system would not be a sufficient protector of American and international standards, **concurred** in *Indiana Gas* [141 F3d. 314 (7th Cir. 1998)] which dismissed that case then before it for lack of diversity jurisdiction.